Supreme Court, U.S.
FILED

99 122 JUN 16 1999

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

KIMBERLY GOODMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RAYMOND AAB
and CAROL KAHN
Attorneys for Petitioner
233 Broadway
New York, New York 10007
(212) 406-1700

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

11981

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Should the Defendant be permitted to withdraw her plea prior to sentence, where the government breached the written plea argument?

2. Was Kimberly Goodman subjected to disparate sentencing under the Equal Protection Clause because the trial court speculatively evaluated her participation in the fraud, and where other co-conspirators received much lessor sentences.

3. Since the Fifth Amendment permits a defendant to remain silent at sentencing under Mitchell v. United States, 119 S.Ct. 1307 (1999) and it is an open question under Mitchell whether silence at sentence can be used against a defendant to evaluate whether she has accepted responsibility, was it an abuse of discretion and a Fifth Amendment violation for the sentencing court to have deemed Ms. Goodman's silence at sentence to be evidence of her failure to accept responsibility?

4. Were Ms. Goodman's Fifth Amendment rights violated when the U.S. Probation Officer questioned her post plea about her involvement in the fraud, without counsel and without first advising her of her right to have her counsel present?

5. Was the plea contract illusory if, contrary to its terms, it was legally impossible for Ms. Goodman to be deemed a minimal participant in the fraud under USSG 3B1.2?

6. Should the government be bound by the plea agreement and estopped from taking a position at sentencing which is inconsistent with the plea agreement that the government itself drafted?

7. Did the trial court, by stating that the existing guideline range for white collar fraud was too lenient, make the plea agreement illusory since the defendant and prosecutor had stipulated in the plea agreement that U.S. Sentencing Guidelines were controlling?

PARTIES BELOW

The parties below in the Court whose judgment is sought to be reviewed are as follows:

United States of America, Appellee

Kimberly Goodman, Defendant-Appellant

As none of the parties are corporations, there are no parent companies or non-wholly owned subsidiaries thereof.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INDEX TO APPENDIX vi

JURISDICTIONAL STATEMENT ix

RELEVANT STATUTES & CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 3

LEGAL ARGUMENT

POINT I

THE DEFENDANT SHOULD HAVE BEEN PERMITTED TO WITHDRAW HER PLEA, WHERE THE GOVERNMENT HAD BREACHED ITS PLEA AGREEMENT 14

POINT II

GOODMAN WAS SUBJECTED TO DISPARATE SENTENCING UNDER THE EQUAL PROTECTION CLAUSE 16

TABLE OF CONTENTS
cont'd

POINT III

SINCE THE FIFTH AMENDMENT PERMITS A DEFENDANT TO REMAIN SILENT AT SENTENCING UNDER *MITCHELL V. UNITED STATES, 119* S.CT. 1307 (1999) AND IT IS AN OPEN QUESTION UNDER MITCHELL WHETHER SILENCE AT SENTENCE CAN BE USED AGAINST A DEFENDANT TO EVALUATE WHETHER SHE HAS ACCEPTED RESPONSIBILITY, IT WAS A GROSS ABUSE OF DISCRETION AND A FIFTH AMENDMENT VIOLATION TO ENHANCE GOODMAN'S POINT SCORE TWO POINTS AND INTERPRET GOODMAN'S SILENCE AT SENTENCE AS A REFUSAL TO ACCEPT RESPONSIBILITY 18

POINT IV

SINCE GOODMAN CHANGED HER POSITION RELYING ON AN UNDELIVERABLE PLEA BARGAIN BY WAIVING THE STATUTE OF LIMITATION ON THE DAY BEFORE IT RAN, HER REMEDY IS SPECIFIC PERFORMANCE OF THE AGREEMENT 19

POINT V

THE TRIAL COURT'S STATED BELIEF THAT THE EXISTING GUIDELINE RANGE FOR WHITE COLLAR FRAUD WAS TOO LENIENT REQUIRES THAT THE DEFENDANT OBTAIN SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT, OR THAT SHE BE PERMITTED TO WITHDRAW HER PLEA 20

TABLE OF AUTHORITIES

Page

CASES

Brady v. United States, 397 U.S. 742, 755 19

Mitchell v. United States, 119 S.Ct. 1307 (1999) ..... Passim

Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976) ..... Passim

Santobello v. New York, 404 U.S. 257 ..... Passim

United States v. Cooper, F.2d (10th Cir. 1995) ..... Passim

United States v. Corsentino, 685 F. 2d 48 (2d Cir. 1982) ... 14

United States v. Goodman, 165 F. 3d 169 (2d Cir. 1999) Passim

United States v. Garcia, 920 F. 2d. 153 (2d Cir. 1990) 17

United States v. Joyner, 924 F.2d 454 (2d Cir. 1991) 2, 17

United States v. Lawlor, 1999 U.S. App. LEXIS 2701 (2d Cir. 2/23/99) 14, 15

United States v. Lewis, 93 F. 3d 1075, 1085 (2d Cir. 1996) ..... Passim

United States v. Merritt, 988 F. 2d 1298,1313 (2d Cir. 1993) 8, 15

United States v. Westerman, 973 F. 2d 1422 (8th Cir. 1992) 17

STATUTES

U.S. Constitution 5th Amendment ..... Passim

18 U.S.C. 1341 ..... Passim

18 U.S.C. 4205(c) 3

28 U.S.C. 2255 20

FRCrP 11 (e) 1 B ..... Passim

FRCrP 20 ..... Passim

FRCrP 32 (d) ..... Passim

U.S.S.G § 1B1.3 ..... Passim

U.S.S.G § 3B1.2(b) ..... Passim

U.S.S.G § 3E1.1 ..... Passim

U.S.S.G § 2F1.1(a) ..... Passim

U.S.S.G. § 2F1.1(b) (1) (k) ..... Passim

U.S.S.G § 5H1.6 ..... Passim

INDEX OF APPENDIX

Appendix A

Order of Second Circuit Dismissing Appeal after Rehearing A1

Appendix B
Second Circuit decision dated January 20, 1999 ..... A2

INDEX OF APPENDIX cont'd

Appendix C

Motion for Stay of Sentence with
Exhibits A and B A13

Appendix D

Judgment of Conviction A21

Appendix E

Plea Agreement A23

Appendix F

Consent to Transfer of Case A36

Appendix G

Excerpts of Transcript - Sentence Conference
Transcript dated 1/13/97 ..... A37

Appendix H

Government Pre-Sentence Memo A40

Appendix I

Excerpt from Transcript - Sentence Conference
Transcript dated 1/13/97 ..... A49

Appendix J

Excerpt from Transcript - Arguments on Presentence
Report dated 5/16/97 ..... A50

JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed on this writ is a judgment on direct appeal: Ms. Goodman's conviction and sentence were affirmed by the Second Circuit January 20, 1999 in United State v. Goodman, Dkt. 97-1513, 165 F. 3d 169 (2d Cir. 1999). An order denying rehearing was issued by the Second Circuit March 18, 1999.

This court has jurisdiction to review this petition under Supreme Court Rule 13 since this petition is made within 90 days of entry of an order denying rehearing of a criminal decision in the Second Circuit Court of Appeals.

UNITED STATES SUPREME COURT

KIMBERLY GOODMAN,

WRIT PETITION
Under Supreme Court
Rule 14

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

WRIT OF CERTIORARI UNDER SUPREME COURT RULE 14

KIMBERLY GOODMAN, by her counsel RAYMOND J. AAB and CAROL KAHN brings the instant writ of certiorari to review constitutional defects in her conviction and sentence in United States v. Goodman, Docket 96-CR-115 W.D.N.Y. filed August 20, 1997 and entered August 27, 1997.

Rule 10 (a) Conflict of Circuits Arguments

Jurisdiction on this writ of certiorari is predicated on Supreme Court Rule 10, in that the decision entered in this matter by the Second Circuit in United States v. Goodman, 165 F. 3d 169 (2d Cir. 1999) conflicts with other circuit courts of appeal, specifically the 10th Circuit in United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) on an important federal question, namely whether a United States attorney breaches his own plea agreement by taking a legal position at sentence which is inconsistent with his position in the plea agreement; and should the government be estopped from taking such an inconsistent position, even if the government's change in legal position is in response to a question of the court rather than a communication initiated by the

prosecutor. Petitioner contends the government's utterance undermined the plea bargain in violation of Santobello v. New York and the Second Circuit should not have let the government circumvent its obligation to adhere to its own agreement. We contend under Supreme Court Rule 10 (a) that the Court of Appeals' approval of the prosecutor's conduct below was such a departure from accepted due process practice as set out in Santobello and United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) as to call for exercise of this Court's supervisory power.

A second important issue worthy of this court's jurisdiction is an important 5th Amendment issue left open in Mitchell v. United States, 119 S.Ct. 1307 (1999), relating to whether a defendant's silence at plea can be used to justify a sentencing enhancement for the defendant's refusal to accept responsibility.

A third issue involves the court's discretion to consider disparate sentencing in evaluating whether to grant a minimal participant role reduction under U.S.S.G. 3B1.2.

We contend this case has a good fact pattern on which the Supreme Court can instruct the lower courts about making findings at sentences based on speculative averages in regard to the applicability of U.S.S.G. 1B1.3. The problem of "apple and orange sentencing" for codefendants to whom different guideline factors apply has troubled the Sentencing Guidelines framers. See, United States v. Joyner, 924 F. 2d 454 (2d Cir.1991). Such a concern is especially relevant in this case where the factors for comparative sentencing were never defined. Can you just pull an average participant or minimal participant out of a hat? This issue applies to all conspiracy fraud defendants where there are subgroups and unclear roles.

This case has interesting facts to explore the issue of an illegal undeliverable plea bargain (see points 4 and 5): and whether specific performance of the plea is the appropriate relief under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976).

Relevant Statutes and Constitutional Provisions

U.S. Constitution 5th Amendment

> "No person shall be held to answer for a capitol or otherwise infamous crime..nor shall be compelled in any criminal case to be a witness against himself without due process of law."

Rule 32 (d) FRCrP

Plea Withdrawal.

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended or disposition is had under 18 U.S.C. 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.

Statement of the Case

An information charging one count of mail fraud under 18 U.S.C. 1341 and 18 U.S.C. 2 was filed in the Central District of California in July 1996. The parties negotiated the plea agreement in the Central District of California, one day before the statute of limitations ran. Pursuant to the agreement, the Defendant Goodman agreed to waive the statute of limitations. The case was then transferred on consent under FRCrP 20 to the Western District of New York. On October 13, 1996, Ms. Goodman appeared with new counsel before the Hon.Richard Arcara and executed the plea agreement and waiver of indictment negotiated and drafted by the government in California, and entered a guilty plea.

The Plea Agreement

The plea agreement contained a stipulated basis for the

plea: Kimberly Goodman, the defendant was a licensed security broker. She was the most minor player in a security fraud conspiracy based in California by which the major player, Steve Wyman, an investment adviser, over a period of five years embezzled $110,000,000 from various institutional investors which were largely cities in California that had invested funds with him. Goodman was not held accountable for the $110,000,000 scheme but only for a portion of a single sub-scheme involving the city of Loma Linda.

Wyman hired many people directly to implement his fraudulent schemes. Goodman never worked for Wyman. Goodman was at first a broker for an investment company, REFCO, with which Wyman invested his clients' money. Wyman looted the accounts of his clients and invested their money in his own name. Goodman acknowledged her involvement in one act of cover up: on July 23, 1991, Ms. Goodman acting as an agent of REFCO sent an audit confirmation to the City of Loma Linda in which she represented that the city's cash account balance at REFCO was $2,699,250.56 when it actually was less than $3,000. Goodman received the false accounting balance information from a co-schemer in Wymer's office in Irvine California who kept a notebook containing the false information that was to be reported to clients. The figure contained in the Wymer notebook was identical with the one that defendant Goodman reported to the City of Loma Linda.

Wymer made defendant Goodman during the period 1987-1991, gifts of a Jaguar and, after the Jaguar was totaled in an accident, a Mercedes, while Wymer's scheme to defraud various cities was ongoing. These gifts were made before Goodman's involvement in the Loma Linda sub-fraud, and the government stated that it did not believe that these gifts were a quid pro quo for Goodman's participation in the fraud. (A 68 – 79) Wymer (who was subsequently convicted of a complex series of fraud schemes) was arrested in 1991. The plea agreement with the government included a stipulated factual basis as follows, at (A 26):

> You and *this* office agree and stipulate to the following statement of facts which form the basis

for the entry of the plea of guilty to the information and which also constitute relevant conduct pursuant to U.5.S.G. §121.3

(a) Defendant Kimberly Goodman worked at REFCO Securities, a broker/dealer from the mid 1980s through early 1992. Through her work at REFCO she came to know Steven Wymer, an investment advisor in Irvine, California. Wymer would cause individuals and municipalities from around the country to deposit excess or surplus funds under his companies? (Denman & Company and Institutional Treasury Management) control. He promised his clients a high rate of return in government securities. When clients invested, he had them send their money to REFCO. Almost immediately he would raid those accounts and use one client's money to pay the other clients to whom he'd also promised a high rate of return.

(b) In order to make the plan succeed Wymer needed to create and furnish to his clients false documentation showing account balances at REFCO that did not in fact exist. He enlisted the assistance of an employee of his who prepared bogus monthly activity reports, sometimes on REFCO letterhead the employee created herself and at other times on actual REFCO letterhead supplied by the defendant, Goodman. These "REFCO documents" contained false trading account information and served to confirm to Wymer's clients that they had funds deposited at REFCO that were not in fact there.

(c) Because the accounting firms that had audited the clients' financial condition would periodically ask for verification of the clients' account balances at REFCO, it also became necessary for Wymer to enlist an insider at REFCO to "verify" client balances when in fact, the clients had no money at REFCO or significantly less than what Wymer had told them. For this purpose he turned to defendant Kimberly Goodman. Wymer had the clients send their audit confirmation queries to Goodman's attention at REFCO. With these queries the clients requested verification of their account balances, securities held and interest paid on the cities account at REFCO. The "REFCO" responses prepared by defendant, Goodman, in New York (after consulting with Wymer employee in California, who had prepared the fraudulent monthly activity reports) relied on by the cities and their auditors for projecting municipal spending.

(d) When defendant Goodman, in New York, received the cities' audit confirmation inquiries, she would telephone Wymer's office to ascertain what information the clients' city had

been told by Wymer. Defendant Goodman would then place the false information (such as information concerning the clients cities account balance) on the confirmation and would often fax a copy to Wymer's office to ensure that she was reporting the "correct" falsified information. Thereafter, defendant Goodman would sign her name to the audit confirmation and cause it to be placed in the U.S. mail where it was subsequently received and relied on by the client cities and their auditors.

(e) In the count alleged in the information, defendant Goodman on or about July 23, 1991 sent an audit confirmation response to the City of Loma Linda in which she represented that the City's cash account balance at REFCO was $2,699,250.56. She received that false information from another co-schemer at Wymer's office in Irvine, California who kept a note book containing the -false information that was to be reported to the clients. The figure contained in the Wymer notebook was identical to the one that defendant Goodman reported to the City of Loma-Linda. The information was false because at the time that defendant Goodman represented -that balance to the City, the City of Loma -Linda actually had slightly less that -$3,000.00 in its account at REFCO.

(f) Wymer made defendant Goodman gifts of two luxury automobiles, specifically a new Jaguar XJS and a new Mercedes 560 SEL during the pendency of the scheme from late 1987 through December 1991 when Wymer (who was subsequently convicted for a complex series of fraud schemes) was arrested. During that time, Wymer also funded a trading account at REFCO that was in defendant Goodman's exclusive control in a total amount of $178,000.00.

(g) A forensic handwriting examiner identified defendant Goodman's handwriting on the following documents which included:

(1) A June 20, 1989 audit confirmation for the City of Loma Linda which confirmed an account at REFCO at a time when the City had no account at REFCO;

(2) A July 19, 1987 audit confirmation for the City of Loma Linda which appeared to "verify" an almost three million balance in the City of Loma Linda's name at REFCO when in fact there was less than $9,000; and

(3) An October 25, 1990 audit confirmation for the City of Loma Linda wherein defendant Goodman represented that the City of Loma Linda's account balance at REFCO was over $2.6 million

when in fact was $2.00. Further, the handwriting examiner also identified defendant Goodman as the writer of the July 23, 1991 audit confirmation for the City of Lou Linda which constitutes the basis of the single count information against defendant Goodman.

(h) A fingerprint analyst identified defendant Goodman's fingerprint on the October 25, 1990 audit confirmation response.

(i) The City of Loma Linda and its auditors relied on the information contained in the audit confirmation prepared by and mailed to them by defendant Goodman. But for the cities' reliance on defendant Goodman's representations and omissions, the City would not have kept its funds under the supervision of Steven Wymer and would not have suffered an after recovery loss of less than $800,000 but more than$500,000. See U.S.S.G. 2F1.1(b)(1)(k) (loss amount less than $800,000 but greater than $500,000).

(j) REFCO compliance officers would have testified that defendant Goodman should not have had client cities directing their audit confirmations to her and that she was acting improperly and not in accordance with REFCO procedures when she contacted Wymer's office to receive the false account balance information which she relayed to the client cities. Moreover, REFCC officials would have testified that it is a violation of company policy to receive cash payments and automobiles from clients/investment advisors.

The stipulated facts recounted above are included in the plea agreement as paragraph 4. In paragraph 5 of the plea agreement the government and defendant agreed to a base offense level of 6, a loss of between $500,000-800,000 for an addition of 10 points in the Sentencing Guidelines, an adjustment of +2 for more than minimal planning, and a reduction of -4 points as a minimal participant adjustment under U.S.S.G. 3B1.2, and a reduction of 2 points for acceptance of responsibility -2 under U.S.S.G. 3E1.1, **applying the applicable Sentencing Guidelines**. (The boldface will become important as the story unfolds.) With a total adjusted offense level of twelve (12) and a criminal history category of one, the parties agreed that the defendant's sentencing range would be 10-16 months (Zone C).

Paragraph 5 of the plea agreement notes **both parties waive the right to argue that other specific offense characteristics or departures may be appropriate,** except that the defense may argue exceptional family circumstances and the government may oppose this request.

Paragraph 6 of the plea agreement spells out very limited conditions subsequent under which the parties are relieved from the sentencing factors stipulation set out in paragraph 5 of the plea agreement.

"You understand there is no agreement as to your criminal history or criminal history category and that your criminal history could alter your offense level if you are a career offender or if the instant offense was a part of a pattern of criminal conduct from which you derived a substantial portion of your income. In the event your offense level is so altered, the parties are not bound by the sentencing factors stipulation set forth in paragraph 5."

None of the paragraph 6 conditions were met in this case.

By implication in the plea agreement, the parties agreed to preserve the appellant's right to appeal if the Court's sentencing calculations differed from those set forth in par. 5 of the plea agreement, with the exception that if the court's calculations differed from defendant's as to criminal history she could appeal. Paragraph 12 of the plea agreement indicates the agreement does not bind the court or probation; this is a plea agreement under FRCrP Rule 11 (e)1(B).

Under paragraph 8 of the plea agreement, the government may recommend a two point reduction for acceptance of responsibility if defendant Goodman demonstrates acceptance at to any time until sentencing.

Under paragraph 9 of the plea agreement, the government retains the right to provide supplementary fact information at sentencing covering "all other relevant information with respect to (defendant's) background, character and conduct." (including uncharged crimes or conduct involving coconspirator Wymer.) Further under paragraph 9 of the plea agreement, the government can advise the court at sentencing of any failures of the defendant to fulfill her obligations under the agreement. Plea agreement paragraph 9 does not give the government any right to argue legal positions of sentencing which are inconsistent with the plea agreement's paragraph 5 if the defendant complies with paragraph 5 and no facts disclose a violation by defendant of paragraph 6 of the agreement.

Wymer gave Goodman the cars prior to July 23, 1991. The plea agreement's stipulated facts in paragraph 5 fail to connect Wymer's gifts to Goodman of the two cars to any misconduct prior to the July 23, 1991 audit fabrication.

During the plea colloquy the court conceded that defendant Goodman did not know of many of the events in the larger conspiracy set out in the stipulated facts of the plea agreement.

First Pre-sentence Report

A pre-sentence report was prepared by the United States Probation Department for the Western District of New York. Defendant Goodman submitted a written statement to probation of her version of the offense set forth at p. 8-9 of defendant's main brief to the 2nd Circuit. Based on Ms. Goodman's statement the Probation Department recommended that Ms. Goodman receive a two (2) point level reduction for acceptance of responsibility because she timely notified the authorities of her intention to enter a guilty plea. Additionally the pre-sentence report recommended a 4 level reduction based on Goodman's minimal role under U.S.S.G. 3B1.2(b).

Probation justified Goodman's minimal role scoring in its report as follows:

"The U.S. Attorney's office in the Central District of California has determined that the mail fraud perpetrated by Steven Wymer was extensive and involved approximately $100,000,000. The tentacles of his scheme reached out to many cities and municipalities throughout the United States. It was felt that despite the defendant's plea which incorporates a loss of between $500,000 and $800,000, her role in the fraud was minimal. In addition, it was Wymer who was the primary mover in the scheme to defraud. It is apparent that the defendant was along for the ride and was most likely not aware of the scope of Wymer's fraud. Thus she is entitled to a reduction for minimal role."

The trial judge, the Hon. Richard Arcara, adjourned sentencing because he felt the stipulation of fact in the plea agreement was inconsistent with a minimal role reduction -4 points and wanted

more information on Goodman's role in the $700,000 loss to Loma Linda.

The government attorney at this pre-sentence appearance, breached the plea agreement by then ascertaining a legal position to the court inconsistent with the government's own plea agreement (paragraphs 5 and 6), as reflected in the transcripts (A 40):

AUSA Bruce: Judge as I understand the position of the Second Circuit, if we're looking solely at her, at her conduct, she can't be a minor or minimal participant, and I think that is where the Court is going.
THE COURT: Do you think that she, based on this plea agreement, those facts, that she would be entitled to any reduction?
AUSA BRUCE: Based on the $700,000, no. (A 40)

The relationship between the AUSA Werner-Simon who negotiated the plea agreement in California and AUSA Bruce who signed it for the government in the WDNY was a bit strained. Although AUSA Bruce repeatedly stated to the court he adopted the AUSA from California's position in full he repeatedly disavowed her legal and factual position, first at (A 40), on January 13, 1997 then in his pre-sentence memo (A 42-48), without the defendant doing anything to violate her part of the plea bargain.

By the next adjourned date the AUSA from California, Ms. Werner-Simon, speaking for the AUSA from the WDNY, presented the court with a white ring binder containing 24 exhibits and a memo of law in support of Goodman's sentence as a minimal participant in the Loma Linda sub-conspiracy. The government's notebook also emphasized Goodman's minimal culpability in relation to seven other participants in the larger scheme who received extremely light sentences: the major kingpin, Wymer, for a $100,000,000 fraud received only 14 years reduced to seven years in prison and a large forfeiture (A 40). His number two man who participated in 1000 separate frauds received only two years in prison. The next five down the list

who also participated in thousands of individual forgeries and many conspiracies were not criminally prosecuted. Goodman was far less culpable than any of the other participants according to the government's notebook which was in presented to the trial court as a sealed exhibit (Ex 13) and was before the Circuit on direct appeal.

Judge Arcara angrily accused the government of result oriented pleading - saying to the AUSA Werner-Simon you'd do anything to keep Goodman out of jail on a Zone C bargain, even distort the nature of minimal participation, and distort the facts. (A 53 -54). Judge Arcara explained in court that he had just returned from a federal sentencing conference where it was agreed that all relevant conduct should be presented to the court and the court must look to the average culpability of a participant in an average fraud of the same total dollar volume, not the relative culpability of the codefendants in the instant case, in establishing minimal participation. Judge Arcara was concerned that the stipulated facts in the plea agreement indicated that Goodman had received approximately $150,000 in new cars and access to a trading account of $178,000, which she lost and repaid, based on her participation in the Loma Linda sub-fraud, in which the city of Loma Linda lost $770,000. The court reasoned that based on those numbers, she was not a minimal participant.

The court appears to say that the plea agreement is illegal: THE COURT: "Just read the plea agreement, Mr. Bruce. I know you didn't handle the plea. I know it was worked out in California. You look at the plea agreement, there's no way you can justify a reduction of four levels, hardly maybe even two levels. I don't see any reduction at all. . . . This whole activity could never have taken place without her help. It could never have happened, but for her providing that false information, this $500 to 800 thousand dollars. That's hardly someone who has an insignificant or minor role. She was an integral part of this particular fraud based upon the facts in the plea agreement" (A 40).

After the government issued its supplemental fact notebook, the probation department issued a second probation

report dated April 18, 1997 changing its evaluation of Goodman's role in the crime from minimal to minor.

On May 16, 1997 the trial court heard argument from AUSA Werner-Simon supporting her continued belief that Goodman deserved the -4 point minimal role adjustment. The court asked about gifts Goodman had received from Wymer, namely, the two cars and the $170,000 trading account. AUSA Werner-Simon replied that she believed Goodman received these gifts as a thank you for legitimate trades on behalf of Wymer (A 55-57; A68-79), unrelated to criminal activities by Goodman. AUSA Werner-Simon indicated that Wymer's claims contained in his earlier affidavit, that he gave money and jewelry to Goodman were untrue. Between Wymer and Goodman, the AUSA believed Goodman (A 50). The court said these claims were sworn to by Werner-Simon in an earlier proffer affidavit in Wymer's case and could not be recanted to protect Goodman. The government continued to advocate for the -4 point minimal role adjustment on the theory that Goodman was the least culpable.

Further, the trial judge frankly stated (A 50) that the federal sentencing guidelines are too lenient on fraud, too tough on drugs. However the defendant and the government in the plea agreement expressly stipulated that they would be bound by the 1995 Sentencing Guidelines and, as noted below, the Defendant Goodman changed her position in reliance on the government's promise to follow the 1995 guidelines by waiving the statute of limitations which was to have run the day after Goodman agreed to plead.

Motion to Withdraw Plea

On June 23, 1997 a month before sentencing, Goodman moved to withdraw her plea under FRCrP Rule 32 (e). Her counsel filed an affirmation July 21, 1997 in support of the motion claiming the government breached the plea agreement by advocating a legal position inconsistent with the plea agreement point's scoring, by advocating an increase in the Guidelines level

based on an abuse of trust adjustment and the removal of an adjustment for acceptance of responsibility. (A 42-48) Defense counsel argued in his memorandum of law that the mere fact that the government attempted in its memo to say that its legal conclusions were not meant as advocating a position, did not save the government from violating the plea agreement since the government was in fact advocating a contrary legal position in its law memo.

Proof of Promissory Estopple

On July 23, 1997 in Goodman's affidavit in support of the motion to vacate the plea Goodman swore that in a conference call with her attorney and the AUSA for the Central District of California on June 20, 1996, she was advised that the statute of limitations was about to expire and she would either have to sign an agreement to extend the statute of limitations or face indictment in California. She signed a waiver of the statute of limitations. Her affidavit further stated that during the conference call she was advised that if she pled guilty she would "qualify" for a Zone C sentence, avoiding imprisonment. If she failed to extend the statute of limitations and plead, she would receive a jail sentence.

Trial Court's Order Denying the Motion to Vacate Plea

On August 18, 1997, the trial court denied Goodman a downward role adjustment as a minor or minimal participant finding that she was pivotal in concealing the Loma Linda sub-scheme by providing a false audit confirmation. The court found Goodman failed to prove she was less culpable than the average participant in the crime, notwithstanding that the court failed to establish who the other players in the Loma Linda fraud were, and what was their average culpability; thus, that finding was totally speculative. The court found Goodman received over $300,000 in illegal profits from the scheme. (i.e. the two cars and the $178,000 investment monies). However, the uncontradicted proof was that

Goodman received legitimate gifts (the cars) from Wymer unrelated to the Loma Linda scheme, and that she had repaid the $178,000.

Recognizing that both probation and the U.S. Attorney recommended that Goodman receive a 2 point downward adjustment for acceptance of responsibility, the court denied the reduction. The court found Goodman's pre-sentence statements to probation denying criminal intent to defraud, and claiming negligence, were inconsistent with her plea allocution and her prior written statement to probation. The court also relied significantly on Goodman's making a motion to vacate the plea as a failure by her to accept responsibility.

Thus, the Defendant's own words to the Probation Officer who interviewed her without counsel in respect of the pre-sentence report, were used against her by the Sentencing Court. If Ms. Goodman had been advised by the P.O. that she had a right to counsel, that anything she said could be used against her, and that she had a right to remain silent about her involvement in the fraud, then her statements would not have formed the very basis for the Court's finding that she failed to accept responsibility.

Ultimately the court sentenced Goodman to thirty (30) months incarceration.

LEGAL ARGUMENT

Point I:

THE DEFENDANT SHOULD HAVE BEEN PERMITTED TO WITHDRAW HER PLEA, WHERE THE GOVERNMENT HAD BREACHED ITS PLEA AGREEMENT

The government breached the plea agreement when prior to sentencing in open court in its pre-sentence memo, it took a position contrary to that stated in the plea agreement, which the government itself drafted. This is so, notwithstanding that the government's contradictory position was solicited by the trial

court. The government's conduct was a clear violation of due process under United States v. Lawlor, 1999 U.S. App. LEXIS 2701 (2d Cir. 2/23/99); United States v. Corsentino, 685 F. 2d 48 (2d Cir. 1982); as well as under the tougher standard of United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995). In view of these precedents, the defendant's plea herein was not voluntary under Santobello v. New York, 404 U.S. 257. Furthermore, in the Tenth Circuit, the prosecution is barred from doing what the prosecutor did in this case, whether or not the prosecutor's contradictory statement is deemed "supplemental" (as the Second Circuit in this case determined).

That the government rationalized its breach of the plea agreement in language in the agreement that "neither the court nor counsel should view the memorandum as advocating a position by the government on either issue addressed", does not justify its taking a contrary position. The government's pre-sentence memo constituted a position advocating an upward modification which was inconsistent with (paragraph 5, p.12) of the plea agreement. Since the defendant Goodman had not herself breached the plea agreement, the government had no right to take legal positions inconsistent with its own plea agreement, (A 40). This is a gross due process violation under Santobello v. New York, 404 U.S. 257, rendering defendant's plea involuntary. "A plea bargain is enforceable and a prosecutor's failure to comply with its terms can in some instances render a defendant's plea involuntary and thereby undermine the constitutional validity of a conviction based on a plea." Additionally under Supreme Court Rule 10b, there appears to be a conflict between the Second and Tenth Circuits. See, United States v. Cooper, 70 F. 3d 563 (10th Cir. 1995) as to what conduct by the government in advocating new facts or law at sentencing violates the plea agreement. In Cooper, any facts submitted by the government after the plea which contradict the plea stipulation are a breach of the plea agreement, not a legal supplement of facts. Thus, the Supreme Court should take this case to unify the law of the Circuits concerning whether the government's contradicting its own stipulated facts prior to sentence requires that the plea be vacated as an involuntary plea.

The Second Circuit erroneously relied on United States v. Merritt, 988 F. 2d 1298,1313 (2d Cir. 1993) to find the prosecutor's legal arguments in support of sentencing harmless, because harmless error analysis should not apply to violations of plea agreements by the government under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976); furthermore, on the facts herein, the breach was not harmless. Remand for re-sentencing before a different judge's the appropriate remedy under United States v. Lawlor, 1999 U.S. App. LEXIS 2701 (2d Cir. 2/23/99).

Defendant Goodman's character was good; she was a lamb by comparison to her security fraud codefendants and Goodman voluntarily pled on the day the statute of limitations ran to the maximum count the government had evidence on which to convict her. Goodman's sentence for covering up prior embezzlements and the Loma Linda sub-fraud by co-conspirators was far higher than the co-conspirators who initiated and orchestrated 1000 of embezzlements. Additionally, as stated above, harmless error analysis doesn't apply to violations of plea agreements by the government. See, Palermo v. Warden, 545 F. 2d 286 at n. 13 (2d Cir. 1976).

Point II:

GOODMAN WAS SUBJECTED TO DISPARATE SENTENCING UNDER THE EQUAL PROTECTION CLAUSE

Goodman was subjected to disparate sentencing under the equal protection clause because the trial court speculatively evaluated her participation in a sub-fraud without any reference whatsoever to the roles of participants in that sub-fraud and, was Goodman improperly not compared to her codefendants' massive heightened culpability in the primary fraud, thereby rendering U.S.S.G. 1B1.3 relevant to all the codefendants, except to Goodman.

The trial court's July 1997 decision denying Goodman the four (4) point reduction, and finding she was a significant

participant in the Loma Linda sub-scheme was based on total speculation since no other participant in the Loma Linda sub-scheme was identified, nor their roles established; and in view of the government's own previously stated position (A 51-55) that even regarding the Loma Linda sub-fraud, Goodman was only a minimal participant. Thus, the Court's basis for rejecting the 4 point reduction for minimal participation was purely speculative, and was not based on evidentiary findings.

Sentencing Guideline 3 B1.2 speaks of *usually* ignoring comparable people of the larger conspiracy where someone is only charged with responsibility for a sub-conspiracy, which language implies that sometimes the comparative culpability of the co-conspirators to the wider conspiracy is relevant for disparate, or comparative sentencing. The trial court here repeatedly refused to consider the huge disparity between the sentences given to Wymer and the other much more culpable co-conspirator's, who defrauded 20 cities over 4 years out of some $100,000.000. Goodman was a tiny player to a cover-up of a single sub-fraud, after others had already defrauded Loma Linda out of $700,000. The Court refused to consider disparate sentencing or to acknowledge that the trial court had any discretion to make such a comparison under U.S.S.G. 3B 1.2(b). See, (A 68-79) saying because she, Goodman, was charged with the smaller offense and was guilty of more uncharged crimes, she wasn't entitled to a downward departure for minimal participation. But, United States v. Joyner, 924 F. 2d 454 (2d Cir. 1991) indicates the Court does have such discretion. Even though United States v. Lewis, 93 F. 3d 1075, 1085 (2d Cir. 1996) denies a minor role adjustment when a defendant's base level offense is calculated on the basis of the conspirator's somewhat limited role in the conspiracy - the court in our case only confirmed that Goodman participated in one act of wrong doing. (See, A 64-67). Thus the trial court should not have looked to the possibility of appellant's larger role in the conspiracy in calculating her base offense level, when in fact no larger involvement existed. The trial court should have considered that the government itself believed that Goodman did not know or understand the scope of

the criminal venture, and that her role vis-a-vis co-conspirators was minimal, and that she profited minimally from the conspiracy in comparison to her co-conspirators. The 4 point downward adjustment should have been granted, analogous to United States v. Garcia, 920 F. 2d. 153 (2d Cir. 1990) and United States v. Westerman, 973 F. 2d 1422 (8th Cir. 1992).

As a policy matter, this case provides the Supreme Court a good fact pattern to instruct the lower courts how to evaluate average participation in a sub-fraud under U.S.S.G. 3.1.2b where some co-defendants are subject to U.S.S.G. 1B1.3 for having participated in multiple frauds, while others aren't; and to guide trial courts in evaluating the average participation of a conspiracy member, where the average participants' roles are not clearly identified in the sub-conspiracies, and the relative weights given each sub-conspiracy in their total sentencing is not discussed. We believe the trial judge's findings of average participation proportion and amount of wrongful gain are based totally on speculation and require remand, but remand to what standard? The Supreme Court must set the standard. The slaps on the wrist given the co-conspirators should have weight in Goodman's sentencing and Lewis shouldn't bar applying a disparate sentencing analysis.

Point III:

SINCE THE FIFTH AMENDMENT PERMITS A DEFENDANT TO REMAIN SILENT AT SENTENCING UNDER *MITCHELL V. UNITED STATES, 119* S.CT. 1307 (1999) AND IT IS AN OPEN QUESTION UNDER MITCHELL WHETHER SILENCE AT SENTENCE CAN BE USED AGAINST A DEFENDANT TO EVALUATE WHETHER SHE HAS ACCEPTED RESPONSIBILITY, IT WAS A GROSS ABUSE OF DISCRETION AND A FIFTH AMENDMENT VIOLATION TO ENHANCE GOODMAN'S POINT SCORE TWO POINTS AND INTERPRET GOODMAN'S SILENCE AT SENTENCE AS A REFUSAL TO ACCEPT RESPONSIBILITY.

This court should accept this writ to resolve an important question involving the scope of a defendant's Fifth Amendment rights left open in Mitchell v. United States, 119 S.Ct. 1307 (1999). This very issue arises in our case and should be addressed since the trial Court denied Goodman a two point sentencing reduction based on acceptane of responsibility, predicated on uncounseled statements she made to the Probation Officer during her pre-sentence interview. Further, this Court needs to address the very important issue applicable to innumerable similar situations concerning the applicability of a defendant's Fifth Amendment rights to remain silent about her involvement in criminal conduct during a pre-sentencing probation interview. In a case where a defendant had counsel, which is in virtually every case, the defendant should not be questioned at a pre-sentence interview without counsel present, or without counsel specifically and clearly waiving counsel's presence.

Point IV:

SINCE GOODMAN CHANGED HER POSITION RELYING ON AN UNDELIVERABLE PLEA BARGAIN BY WAIVING THE STATUTE OF LIMITATION ON THE DAY BEFORE IT RAN, HER REMEDY IS SPECIFIC PERFORMANCE OF THE AGREEMENT

The trial court stated at (A 40) that the plea bargain was internally inconsistent and undeliverable because the stipulated facts admit more than minimal participation. Yet Goodman changed her position to her detriment by signing a waiver of the statute of limitations in reliance on this same plea offer. In, Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976) the Second Circuit states:

"when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. . . . Neither the inadvertence of the breach nor its possibly harmless effect obviated the need for remand to the state court for appropriate relief? Clearly then Santobello requires relief when the prosecutor fails to fulfill promises within his power made in

negotiating a plea bargain? We believe that the reasoning underlying Santobello applies no less when the prosecutor makes unfulfillable promises in negotiating a plea. More importantly the voluntariness of a plea induced by unfulfillable promises is of course open to grave doubt, Brady v. United States, 397 U.S. 742, 755.

In Palermo, 545 F. 2d 286, at 296, specific performance of the unfulfillable plea was the due process remedy. A similar remedy should be applied here. It matters not that the government negotiated in bad faith or accidentally negotiated a legally impossible plea agreement inconsistent on its face. Since Goodman changed her position in reliance on this undeliverable agreement by waiving the statute of limitations, her bargain should be delivered, namely, a Zone C sentence, or she should be permitted to withdraw the plea under FRCrP 20 (c) and the case should be restored to the California District Court docket.

Although this argument was not raised below, the issue of coerced plea was raised, and the facts are within the record of appeal. The other issues were preserved on the direct appeal record.

Point V:

THE TRIAL COURT'S STATED BELIEF THAT THE EXISTING GUIDELINE RANGE FOR WHITE COLLAR FRAUD WAS TOO LENIENT REQUIRES THAT THE DEFENDANT OBTAIN SPECIFIC PERFORMANCE OF THE PLEA AGREEMENT, OR THAT SHE BE PERMITTED TO WITHDRAW HER PLEA

This point deserves to be addressed for the same reasons that Point IV deserves to be addressed. If defendant Goodman changed her position by waiving the statute of limitations and agreeing to an illusory plea, and in view of the fact that the trial court would not abide by the 1995 fraud Guidelines, Goodman's plea was not voluntary and she is entitled to relief under Palermo and Saltzman v. Warden, 545 F. 2d 286 (2d Cir. 1976), namely, specific performance. Although this factual issue wasn't raised

below, the matter of a coerced plea was raised, and specific performance or vacation of the plea was sought below. Since the appropriate facts are clear from the record, this court should address issues on the writ of certiorari, and should not require defendant to file a writ of habeas corpus under 28 U.S.C. §2255 to address these issues.

FOR THE REASONS STATED THE WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, N.Y.
June 10, 1999

YOURS, ETC.

RAYMOND AAB and
CAROL KAHN
Attorneys for Petitioner
K. Goodman
233 Broadway, 18th Floor
New York, N.Y. 10279
(212) 406-1700

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007
CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of March one thousand nine hundred and ninety-nine.

Present:

Hon. Jon O. Newman

Hon. Richard J. Cardamone

Hon. Fred I. Parker

CIRCUIT JUDGES

USA

Docket No. 97-1513

v

Goodman

A petition for panel rehearing having been filed herein by Kimberly Goodman,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED. FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk
By: _____
Beth J. Meador,
Administrative Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 1998

Argued: September 1, 1998 Decided: January 20, 1999
Docket No. 97-1513

UNITED STATES OF AMERICA,
Appellee,

v.

KIMBERLY GOODMAN,
Defendant-Appellant.

Before: NEWMAN, CARDAMONE, and PARKER, Circuit Judges.

Appeal from the August 20, 1997, judgment of the United States District Court for the Western District of New York (Richard J. Arcara, Judge) convicting appellant, or her plea of guilty, of mail fraud. Appellant seeks to withdraw her pleas and to challenge sentence; appellee moves to dismiss sentencing challenges because of appellate waiver.

Appellee's motion to dismiss denied; conviction and sentence affirmed.

Herbert L. Greenman, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Buffalo, N.Y., for defendant-appellant.

Anthony M. Bruce, Ass't U.S. Atty., Buffalo, N.Y. (Denise E. O'Donnell, U.S. Atty., Buffalo, N.Y., on the brief), for appellee.

JON O. NEWMAN, Circuit Judge:

The recurring use in plea bargains of variously worded provisions waiving a defendant's right to appeal once again presents an issue of the validity of such a waiver. In the agreement in this case, the appellant waived the right to appeal any sentence within the statutory maximum. The validity of the waiver arises on an appeal by Kimberly Goodman from the August 20, 1997, judgment of the District Court for the Western District of New York (Richard J. Arcara., District Judge), convicting her, on a plea of guilty, of one count of mail fraud in violation of 18 U.S.C.A. § 1341 (West Supp. 1998), and imposing a sentence that included 30 months of imprisonment. Goodman challenges the District Court's denial of her motion to withdraw her guilty plea and two aspects of the calculations under the Sentencing Guidelines. The Government contends that the waiver of appellate right concerning the sentence should be enforced and the appeal from the sentence should be dismissed because the sentence was within the statutory maximum.

We hold that the appeal waiver provision used by the United States Attorney's Office for the Western District of New York in Goodman's plea agreement is not enforceable under the circumstances of this case. On the merits, we conclude that the District Court did not exceed its discretion in denying Goodman's motion to withdraw her plea and that the sentence was correctly calculated. We therefore affirm.

Background

From the mid-1980s through early 1992, Goodman worked as a commodities broker at REFCO Securities, Inc. ("REFCO'), A New York based securities broker-dealer. Through her work at REFCO, Goodman came to know Steven Wymer, an investment advisor in Irvine, California. Goodman eventually became involved with a fraudulent scheme orchestrated by Wymer.

Promising extraordinarily high rates of return, Wymer induced individual and municipal clients to place funds under his control. Wymer instructed his clients to deposit their money in

accounts at REFCO, telling them that he used REFCO to make purchases and sales of securities and as a custodian of clients' funds. Almost immediately after a client deposited funds with REFCO, Wymer would raid the account, using one client's money either to pay other clients or to enrich himself.

To facilitate this plan, Wymer enlisted an employee at his investment advisory firm to generate false documents showing exaggerated account balances and transactions that had not occurred. However, because accounting firms that audited the financial condition of some of Wymer's municipal clients periodically would ask for verification of the clients' account balances at REFCO, it became necessary for Wymer to enlist an insider at REFCO. For this purpose, Wymer turned to Goodman.

Wymer instructed his clients to send audit confirmation inquiries to Goodman's attention at REFCO. When Goodman received these inquiries, she would telephone Wymer's office to ascertain what fraudulent information Wymer's employee had given the client. Goodman would then prepare a form verifying this false information and mail it to the client's auditor. The municipal clients and their auditors relied on the false REFCO verifications in projecting municipal spending. Apparently in exchange for her assistance, Goodman received two luxury automobiles from Wymer.

Wymer was ultimately convicted of charges arising from a series of fraudulent schemes. Wymer's schemes resulted in losses of over $100 million to his clients.

The United States Attorney for the Central District of California filed a one-count information charging Goodman with mail fraud in connection with her preparation and mailing of a single false audit verification to the auditors of one of Wymer's municipal clients. Goodman executed both a Waiver of Indictment and a Consent to Transfer of Case for Plea and Sentence, resulting in the transfer of her case to the Western District of New York. Goodman then appeared before Judge Arcara, at which time she re-executed the Waiver of Indictment and entered a guilty plea pursuant to a written plea agreement.

The plea agreement stipulated that Goodman's adjusted

offense level was 12 and her criminal history category was I, which yielded a sentencing range of ten to sixteen months. The adjusted offense level reflected a reduction of four levels because Goodman had been a "minimal participant," see U.S.S.G.§ 3B1.2 (1997), and two levels for her acceptance of responsibility, see U.S.S.G. § 3E1.1 (1997). As is typical, the plea agreement cautioned that neither the Probation Office nor the District Court was bound by the agreed upon Guidelines calculation. Spelling out the implications of this fact, the agreement stated, "You understand that if the Court ascertains factors different from those contained in the stipulation, you cannot, for that reason alone, withdraw your guilty plea." In addition, Goodman agreed that if she breached the plea agreement in any way, the Government would no longer be bound by its sentencing recommendation.

The plea agreement also contained a section titled "Waiver of Appeal." It stated that Goodman "knowingly and voluntarily waive[d her] right o appeal any sentence... imposed by the Court and the manner in which the sentence is determined so long as [the] sentence is within the statutory maximum specified above." During the plea allocution, the provision was read to Goodman, and she affirmed that she understood "everything." Judge Arcara then made the following comment on the appeal waiver:

> There will be no appeal except two ways; one, that departure we talked about before; two; if there's an offense determination that is recommended by the probation office, I look at it and let's say it's a higher number and you disagree with me on that, you'd have a right to appeal that.

Though this statement was not entirely clear and appeared to be inconsistent with the language of the plea agreement, Goodman stated that she understood the judge's comment.

On the date set for sentencing, the District Judge stated that he had serious concerns regarding Goodman's role in the offense, and directed both parties and the Probation Office to

prepare reports on the issue. During a hearing on that issue, Judge Arcara voiced his concern that Goodman had not accepted responsibility for her actions and, therefore, might not be entitled to a two-level reduction pursuant to section 3E1.1. Goodman's Presentence Report indicated that although she recognized that her actions facilitated the Wymer scheme and accepted responsibility for "her lack of due diligence," she maintained that she "d[id] not act with criminal intent or knowledge."

A week before the date set for sentencing, Goodman moved to withdraw her plea on the ground that the sentence the District Court was likely to impose would substantially exceed the sentence she expected when she entered into the plea agreement. A week later, the District Judge requested briefs on the issues of whether Goodman was entitled to a reduction for acceptance of responsibility and should receive an enhancement for an abuse of trust, pursuant to section 3B1.3.

Thereafter, the District Court denied Goodman's motion to withdraw her plea, finding that her desire to avoid a sentence more severe than she had expected at the time of her plea agreement did not constitute "a fair and just reason" warranting a plea withdrawal prior to sentence, under the standards of Fed. R. Crim. P. 32(e). The District Court also rejected Goodman's argument that she should be allowed to withdraw her plea because, in her view, the Government had breached the plea agreement by arguing against an offense level reduction for acceptance of responsibility and for an abuse-of-trust enhancement. The District Court found that the Government's submission on these issues had not advocated a position on the ultimate sentence but had only endeavored to supply the Court with the law and the facts, and therefore did not violate the plea agreement. Indeed, the District Court found that Goodman had breached the plea agreement by moving to withdraw her plea.

In the same ruling, the Court held that the defendant had failed to prove by a preponderance of the evidence that she was entitled to a reduction in her offense level for her role in the offense or for acceptance of responsibility, but the Court declined to make an upward adjustment for abuse of trust. The District

Court sentenced the defendant, principally, to thirty months of imprisonment.

Discussion

I. Motion to Withdraw Plea

A motion to withdraw a guilty plea before a sentence is imposed may be granted, "if the defendant shows any fair and just reason." Fed. R. Crim. P. 32(e). Nevertheless, a defendant "has no automatic entitlement to have such a motion granted, for '[s]ociety has a strong interest in the finality of guilty pleas,' and allowing withdrawal of pleas not only 'undermines confidence in the integrity of our judicial procedures,' but also 'increases the volume of judicial work, and delays and impairs the orderly administration of justice.' "United States v. Maher, 108 F.3d 1513, 1529 (2d Cir. 1997) (quoting United Sates v Sweeney, 878 F.2d 68, 70 (2d Cir. 1989)). We have explicitly stated that "'[t]he fact that a defendant has a change of heart prompted by his reevaluation of... the penalty that might be imposed is not a sufficient reason to permit withdrawal of a plea.'" Id. (quoting United States v. Gonzalez, 970 F.2d 1095, 1100 (2d Cir. 1992)).

A defendant bears the burden to persuade the district court that she has a fair and just reason to withdraw her plea. See United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994). We review the findings of fact that led to the denial of the withdrawal motion for clear error; the decision itself is reversed only if it constitutes an abuse of discretion. See id.

Goodman contends that she should have been allowed to withdraw her plea for two reasons. First, she argues that because the District Court was not going to grant a downward adjustment for her role in the offense, she faced a sentence of incarceration significantly longer than the sentence she anticipated when she entered into the plea agreement. The District Court properly rejected this claim as an invalid ground for withdrawal of a plea. See Maher, 108 F.3d at 1529.

Second, Goodman argues that she should have been allowed to withdraw her plea because the Government breached the plea agreement by submitting a brief on the issues of an

acceptance-of-responsibility reduction and an abuse-of-trust enhancement. The plea agreement had stipulated to upward adjustments for the amount of the loss, see U.S.S.G § 2F1.1(b)(1)(K) (1997), and for more than minimal planning, see id. § 2F1.1(b) (2), and downward adjustments for "minimal" participation, see id. §3B1.2(a), and acceptance of responsibility , see id. §3E1.1. In the plea agreement, both partied had agreed to "waive the right to argue that other specific...adjustments...may be appropriate."

The Government's submission concerning an abuse-of-trust enhancement and an acceptance-of-responsibility reduction is not a ground for relief. In the first place, it was Judge Arcara, not the Government, who raised questions about these adjustments. Judge Arcara directed the government to provide him with the pertinent information, which was clearly within his power. Second, the Government expressly stated in its written submission that "neither the Court nor counsel should view [the] Memorandum as advocating a position by the Government on either issue addressed. "Government's Memorandum of Points and Authorities at 2. Third, and most important, the Government in fact did not advocate that an abuse-of-trust enhancement should be imposed or that an acceptance-of responsibility reduction should be denied. The Government's submission stated that "the Court could find that the defendant Goodman's attempt to withdraw her plea militates against her receiving a reduction... for 'acceptance.'" Id. (Emphases added). This view of the relevant guidelines did tend to offer some slight support for the enhancement and for denial of the reduction, and the Government might have been better advised to inform the Court that, because of the plea agreement, it would have to refrain from saying anything concerning these matters. Nevertheless, the Government's compliance with the District Court's direction to comment on the facts and the law did not violate the plea agreement. See United States v. Merritt, 988 F.2d 1298, 1313 (2d cir. 1993).

Under these circumstances, the District Court did not exceed its discretion in concluding that Goodman failed to

demonstrate a fair and just reason warranting withdrawal of her guilty plea.

II. Sentencing

A. Waiver of Right to Appeal

The Government contends that Goodman's appeal should be dismissed to the extent theat she challenges her sentence because she waived the right to appeal any sentence so long as it does not exceed the maximum term allowed under 18 U.S.C. §1341 — five years' imprisonment.

The validity of a waiver of the right to appeal a sentence has been a recurring issue in this Court. We have regularly enforced knowing and voluntary waivers in the conventional form that waive the right to appeal a sentence within (or below) an agreed guideline range. See, United States v. Chen, 127 F.3d 286, 288 (2d Cir. 1997); Maher, 108 F.3d at 1513; United States v. Ready, 82 F.3d 551, 555 (2d Cir. 1996); United States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995), though even a limited waiver of this sort does not relinquish appellate rights "in every circumstance,"see Yemitan, 70 F.3d at 748; see also United States v. Jacobson, 15 F.3d 19, 22-23 (2d Cir. 1994) (reliance on unconstitutional factor may invalidate waiver). Where the waiver more broadly purports to waive the right to appeal a sentence within (or below) whatever guideline range the sentencing determines is applicable, we have encountered more difficulty. We rejected the validity of such a waiver in United States v. Rosa, 123 F.3d 94, 97-102 (2d Cir. 1997), under circumstances where the defendant obtained substantial benefits from the plea bargain and the sentence imposed was only slightly above the top of the predicted guideline range. The Rosa/Martinez-Rios form of waiver leaves a defendant free to appeal an upward departure but denies him the opportunity to challenge the correctness of the sentencing judge's determination as to the applicable guideline range. See Martinez-Rios, 143 F.3d at 668.

The waiver in the pending case is even broader than the Rosa/Martinez-Rios form since the waiver purports to deny the defendant any appellate challenge not only to the selection of an

applicable guideline range but also to any upward departure from that range, as long as the statutory maximum is not exceeded. Though we have no need to consider whether this broad form of waiver might ever be enforceable, see United States v. Atterberry, 144 F.3d 1299, 1300-01 (10th Cir, 1998) enforcing similar waiver provision), We conclude that it is not enforceable in this case. As we noted in Rosa, an unorthodox [appellate waiver] agreement presents grave dangers and implicates both constitutional questions and ordinary principles of fairness and justice" necessitating " a close look." Rosa, 123 F.3d at 99.

Taking that "close look," we first note that Goodman received very little benefit in exchange for her plea of guilty. She pleaded guilty to the count of mail fraud charged in the information, and the Government conceded that this was the only one of Goodman's alleged activities that it believed it could prove if the case went to trial. Second, although Goodman obtained the government's agreement to recommend a four-level downward adjustment for her role in the offense and a two-level adjustment for her acceptance of responsibility, she received neither reduction at sentencing. Third, although Goodman assured the District Court that she had read the plea agreement and understood the waiver provision, the sentencing judge's statement to Goodman during the plea allocution left her understanding of the provision in considerable doubt. Judge Arcara suggested, contrary to the language of the agreement, that Goodman would retain the right to appeal her sentence if he concluded that either an upward departure or an offense level different from the stipulated level was appropriate. Finally, we note that the discrepancy between the sentence imposed — thirty months in prison — and the predicted sentencing range — ten to sixteen months — is substantial. The sentence imposed is nearly twice as long as the high-end of the predicted guideline range.

In light of all of these circumstances, we will not enforce the broad form of waiver in this case, one that would subject the defendant to "a virtually unbounded risk of error or abuse by the sentencing court." Rosa, 123 F.3d at 99. And, as in Martinez-Rios, we conclude that the appropriate remedy is to sever the

waiver from the remainder of the plea agreement and consider the merits of Goodman's sentencing appeal. See Martinez-Rios, 143 F.3d at 669.

B. Reduction for Role in the Offense

Section 3B1.2 of the Guidelines provide for a four-level downward adjustment if the defendant was a minimal participant in criminal activity, and a two-level downward adjustment where the defendant was a minor participant. Goodman contends that the district court erred when it found that her role in the offense was neither minor nor minimal. We review such factual determinations for clear error. See United States v. Martin, 78 F.3d 808, 814 (2d Cir. 1996).

The District Court ruled that because Goodman was charged with only a small part of the Wymer scheme and her base offense level, was calculated on the basis of her limited role, the further benefit of a minor role reduction was not warranted. We have upheld the denial of a minor role adjustment in the analogous context of a conspiracy conviction, where a defendant's base offence level is calculated on the basis of his somewhat limited role in the conspiracy. See United States v. Lewis, 93 F.3d 1075, 1085 (2d Cir. 1996).

Here, Goodman was charged and convicted on the basis of her role in fraudulently confirming only one audit verification. Though the scope of her activity was not as extensive as that of other participants in Wymer's fraudulent scheme, her significant role in accomplishing her portion of the fraud did not require a minor role reduction.

C. Reduction for Acceptance of Responsibility

Goodman also contends that the District Court erred by not granting her a reduction for acceptance of responsibility . Section 3E1.1(a) of the Guidelines provides that a defendant's offense level shall be decreased" [i]f the defendant clearly demonstrates acceptance of responsibility for his offense." Although many defendants who plead guilty receive this two-level adjustment, a defendant who enters a guilty plea "is not entitled to an adjustment under [§ 3E1.1] as a matter of right, "U.S.S.G §

3E1.1, comment n.3, and a sentencing court's denial "is entitled to great deference on review," id. n.5; see also United States v. Remini, 967 F.2d 754, 760 (2d Cir. 1992).

Despite her entry of a guilty plea and initial admissions that she knew the audit confirmations were false and that she had acted with the intent to defraud, Goodman subsequently maintained that she had acted without criminal intent and merely failed to exercise due diligence in reviewing the audit confirmations. The District Court was entitled to conclude that a defendant who expresses regret for results of criminal conduct without admitting criminal intent does not accept responsibility within the meaning of the Sentencing Guidelines. See United States v. Moskowitz, 883 F.2d 1142, 1155 (2d cir. 1989); see also United States v. Williams, 940 F.2d 176, 183 (6th cir. 1991). In the circumstances of this case, the Court was also entitled to rely on Goodman's motion to withdraw her guilty plea. See United States v. Negron, 967 F.2d 68,73 (2d cir. 1992) (The Court must evaluate the reason for the attempt to withdraw the plea and assess the acceptance-of-responsibility question in that light.". The District Court correctly applied Negron by determining that:

> defendant states that she wants to withdraw her plea because she anticipates that she will receive a sentence more severe than she expected when she agreed to take a plea. In the Court's view, this reason for withdrawing the plea demonstrates a lack of sincere remorse on the part of the defendant.

Conclusion

The Government's motion to dismiss the appeal from the sentence is denied, and the judgment of conviction and sentence is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion should be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a)) Include brief statement of facts with page references to the moving papers.

UNITED STATES OF AMERICA, 97-1513
Docket Number

-against-

KIMBERLY GOODMAN
Defendant.

MOTION INFORMATION FORM

Motion for Stay of Sentence

MOTION BY:(*Name, address and tel.no. Of law firm and of attorney in charge of case*)

Raymond J. Aab & Carol Kahn
233 Broadway
New York, New York 10279
212-406-1700

Has consent of opposing counsel:
A. been sought? __yes __no
B. been obtained? ___yes __no

Has service been effected?__yes___no

Is oral argument desired? __yes ___no
(Substantive motions only)

Requested return date: 5/11/99
(See Second Circuit rule 27(b).)

Has argument date of appeal been set:
A. by scheduling order?
___yes ___no
B. by firm date/argument notice?
___yes ___no

C. if yes, enter date:_____

OPPOSING COUNSEL: (*Name, address and tel.no. Of law firm and of attorney in charge of case*)
AUSA Anthony Bruce
138 Delaware Avenue
Buffalo, N.Y. 14202
716-551-4811

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ____yes ____no
(See F.R.A.P Rule 8)

Any previous request for similar relief made to the 2nd Circuit? ____yes ____no

Would expedited appeal eliminate need for this motion? ____yes ____no

If no, explain why not:
The relief sought is for a stay pending determination for certiorari to US S. Ct.

Will the parties agree to maintain the status quo until the motion is heard? ____yes ___no

Judge or agency whose order is being appealed: Sentencing by D.J. Richard Arcara (WDNY)

Brief statement of relief requested: Stay of sentence pending determination by the U.S. Supreme Court of Appellant's petition for certiorari. The U.S.D.C has previously stayed the execution of the sentence pending appeal to the Second Circuit, which denied the appeal in a published decision.

By: (Signature of Attorney) Signed name must be printed beneath.	Appearing for: (Name of Party) RAYMOND J. AAB & CAROLE KAHN
	Appellant or Petitioner: _Plaintiff X Defendant
Date:	Appellee or Respondent: _Plaintiff_ Defendant

ORDER

Kindly leave this space blank.

BEFORE:

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied.

For the Court:
CAROLYN CLARK CAMPBELL, CLERK

Date

By

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

Docket No. 97-1513
AFFIRMATION

KIMBERLY GOODMAN,
Defendant.

RAYMOND J. AAB, an attorney duly admitted to practice in the Courts of New York, affirms the following under penalty of perjury:

1. This affirmation is submitted in support of the Appellant Kimberly Goodman's motion for a stay of the execution of sentence pending consideration by the United States Supreme Court of Appellant's petition for a writ of certiorari, from the decision of this court dated March 18, 1999, denying her appeal after rehearing. By notice from the United States Marshall's Service dated April 26, 1999, Ms. Goodman was directed to surrender herself to begin her incarceration on May 13, 1999. Appended hereto as Exhibit "A" is a copy of the Marshall's notice.

2. Following Ms. Goodman's conviction after plea, the trial court sentenced her to 30 months, and stayed the execution of that sentence until the appeal to this court was concluded. This Court subsequently denied the appeal and Appellant then made an application to the trial court for a continuation of the stay pending a determination by the United States Supreme Court of Appellant's petition for certiorari. The trial court denied that motion in a written decision filed on April 21, 1999, a copy of which is appended hereto as Exhibit "B".

3. The facts in this case were presented to this Court in the appeal and motion for rehearing of that appeal, and Appellant respectfully refers to the record of that appeal for a full recitation of the facts.

4. Affirmant believes that meritorious issues for appeal are

present in this case as detailed in the draft of Appellant's petition for a writ of certiorari. A copy of that draft petition is appended hereto as Exhibit "C". Although this court has considered some of the issues to be presented to the Supreme Court, it has not addressed all of the issues being presented to that Court, as these issues were previously raised before this Court. Specifically, the writ petition raises an issues addressed by the Supreme Court subsequent to this appeal concerning a defendant's right to Fifth Amendment protection at sentencing proceedings. See, Mitchell v. United States, 119 S.Ct. 1307 (1999). The writ petition also raises the issue of the defendant's right to counsel at a pre-sentence interview before the U.S. Probation Officer, a material aspect in this case because the trial court used the Appellant's statements to the interviewing probation officer as a basis for denying her a two point reduction for acceptance of responsibility.

5. No prejudice will result to the government if the stay of the sentence is continued pending the Supreme Court's determination of Appellant's writ petition. Under Supreme Court Rules, the writ petition must be submitted by June 18, 1999, and it will be submitted within approximately two weeks time. And, the government acknowledges that Appellant is not a risk of flight or a threat to the community.

WHEREFORE, Appellant respectfully requests that the Court stay the execution of her sentence until the Supreme Court determines her petition for certiorari.

Dated: New York, N.Y.
April 29, 1999

RAYMOND J. AAB and
CAROL KAHN
Attorneys for Appellant
233 Broadway
New York, N.Y. 10279
212-406-1700

To:
U.S. Attorney, WDNY

Exhibit A

U. S. Department of Justice
United States Marshals Service
Western District of New York
Buffalo, New York 14202
CM# P3171962 4 0
April 26, 1999

Kimberly Goodman
66 West Park Road
Grand Island, New York 14072

Dear Ms. Goodman:

The United States Bureau of Prisons has designated the FPC ALDERSON at Alderson, West Virginia, per court order 96 CR 115 001 dated August 20, 1997, signed by Richard J. Arcara, United States District Judge. You will voluntarily surrender yourself to this institution on May 13, 1999, no later than 2:00 P.M.

Sincerely,

JOHN P. Mc CAFFREY
U.S. MARSHAL

BY: James A. Alduino
Chief Deputy U.S. Marshal

JPM: JAA : sdo
CC. Joseph B. Mistrett, AFPD
300 Pearl Street, Suite 450
Buffalo, New York 14202
CM#P317196241
Herbert L. Greenman, Esq.
42 Delaware Avenue, Suite
Buffalo, New York 14202
CM#P317196242

Exhibit B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. DECISION AND ORDER
96-CR-O115A

KIMBERLY GOODMAN,
Defendant.

INTRODUCTION

On October 3, 1996, defendant Kimberly Goodman waived indictment and plead guilty to a one-count information charging her with mail fraud, in violation of 18 U.S.C. § 1341. On August 20, 1997, the Court sentenced defendant to 30 months imprisonment. Judgment was entered on August 27, 1997. Defendant filed a notice of appeal on September 3, 1997. On September 30, 1997, defendant filed a motion to stay execution of her sentence pending appeal. On October 7, 1997, the Court granted defendant's motion.

On appeal, defendant challenged the Court's denial of her motion to withdraw her plea of guilty and two aspects of the calculations under the United States Sentencing Guidelines ("U.S.S.G."). On January 20, 1999, the Second Circuit Court of Appeals affirmed defendant's conviction and sentence in all respects. See United States v. Goodman, 165 F.3d 189 (2d Cir. 1999). Prior to the issuance of the mandate on March 18, 1999, and issued the mandate on March 25, 1999. The mandate was received and filed in this Court on March 29, 1999.

On April 1, 1999, defendant moved this Court, pursuant to Fed. R. App. F. 8(a)(1)(A) and Supreme Court Rule 23(3), for an order staying the execution of her sentence pending a petition for writ of certiorari before the United States Supreme Court. The government filed a response in opposition to defendant's motion on April 8, 1999, and defendant filed a reply affidavit on April

12, 1999.

After reviewing the submissions of the parties, the Court hereby denies defendant's motion to stay execution of sentence.

DISCUSSION

18 U.S.C. § 1343(b) governs the release or detention of a defendant pending appeal or a petition for writ of certiorari[1] Section 3143(b)(1) provides, in pertinent part, that:

> The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in- (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Section 1343(b) creates a presumption against post-conviction release pending appeal. See United States v. Barth, 1996 WL 684389 (D. Conn. May 22, 1996).

Applying the criteria in § 1343(b) to the instant case, the Court finds that defendant should not be released pending her

---

[1](Defendant brought her motion under Fed. R. App. P.8(a)(1)(A). Fed. R. App. P. 8(c) states that in a criminal cacase, a stay of execution of sentence is governed by Fed. R. Crim. P. 38. Fed. R. Crim. P.38 in turn refers to Fed. R. App. P. 9. Fed. R. Apo. P. 9(c) provides that the Court must make its decision regarding release in accordance with the applicable provision of 18 U.S.C. §§ 3142, 3143 and 3145(c). Sections 3142 and 3145(c) are not applicable to the circumstances present here.

petition for a writ of certiorari. Based on the record, including the Second Circuit's opinion affirming defendant's conviction, the Court concludes that it is improbable that defendant can raise a substantial question of law or fact on her petition for writ of certiorari likely to result in any of the consequences listed in §1343(b)(1)(B). The claims of error that defendant states she will assert in her petition for certiorari are not constitutional in nature and do not involve issues of statutory construction. Rather, the issues that she plans to raise would require the Supreme Court to review this Court's denial of her motion to withdraw her plea for an abuse of discretion and the application of the U.S.S.G. to determine whether the Court's findings of fact were clearly erroneous. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The fact that the Second Circuit has affirmed defendant's conviction and denied her petition for rehearing, the nature of the grounds of her petition for a writ of certiorari, and the Supreme Court's policy against reviewing such cases all weigh against defendant's release pending her petition for writ of certiorari.

CONCLUSION

For the reasons stated, defendant's motion for stay of execution of sentence is denied in all respects. Defendant shall voluntarily surrender in accordance with instructions given to her by the United States Marshals Service.

IT IS SO ORDERED.

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: April 21, 1999

APPENDIX D

UNITED STATES DISTRICT COURT
Western District of New York

United States of America **JUDGEMENT IN A CRIMINAL CASE**

(For Offenses Committed
v. On or After November 1, 1987)
Case Number: 1:96CR00115-001

Kimberly Goodman
(Name of the Defendant) Joseph B. Mistrett
Defendant's Attorney

THE DEFENDANT:
X pleaded guilty to count I
pleaded nolo contendere to count(s)_____
which was accepted by the court.
was found guilty on count(s)_____
after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18:U.S.C.§1341	Mail Fraud	7/23/91	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__The defendant has been found not guilty on count(s)_____

__Counts(s) _____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 091-58-8491
Defendant's Date of Birth: September 27, 1959
Defendant's USM No.: 08822-055
Defendant's Residence Address:

66 West Park Road
Grand Island, NY 14072

Defendant's Mailing Address:
Same as above

August 20, 1997
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Richard J. Arcara, U.S.District Judge
Name & Title of Judicial Officer

August 26, 1997
Date

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

v. 96-CR-115A (WDNY)
CR 96-631 (CDCA)

KIMBERLY GOODMAN,
Defendant.

PLEA AGREEMENT

United States v. Kimberly Goodman, CR 96-631 (Central District of California); 96-CR-115A (Western District of New York).

INTRODUCTORY PARAGRAPH

1. This constitutes the plea agreement pursuant to Rule 11 (e)(l)(B) of the Federal Rules of Criminal Procedure which has been offered to you by the United States Attorney's Office for the Central District of California ("this Office") in United States v. Kimberly Goodman. This agreement is limited to the United States Attorney's Office for the Central District of California and the United States Attorney's Office for the Western District of New York for the purposes of a Rule 20 (of the Federal Rules of Criminal Procedure) disposition, but does not bind any other federal, state or local prosecuting, administrative or regulatory authorities. This agreement applies only to criminal violations relating to you. This agreement does not apply to any forfeiture proceedings, judicial, administrative, or otherwise, and shall not preclude any past, present, or future forfeiture actions. This agreement is premised on defendant Goodman executing a "Consent to Transfer Case for Plea and Sentence" and "Waiver of Indictment". By signing this agreement defendant Goodman acknowledges the right, jurisdiction and authority of the District

Court and the United States Attorney for the Western District of New York to handle defendant's plea of guilty to the information and subsequent sentence as set out in this plea agreement. If, after discussing this offer with your attorney, you and your attorney decide to accept this offer, please sign in the spaces provided below. If you do not accept this offer by October 3, 1996, it is automatically withdrawn. In order to resolve this matter fairly and in a manner that accurately reflects your conduct, and the pursuit of justice, the terms of the agreement are as follows:

PLEA

2. You agree to plead guilty to a single count information in United States v. Kimberly Goodman in lieu of being charged in a multi-count conspiracy and mail fraud indictment. By signing this agreement, you waive indictment by a grand jury and agree to plead guilty to an information charging you with a substantive mail fraud count in violation of 18 U.S.C. § 1341, concerning the July 23, 1991 audit confirmation for the City of Loma Linda, California which you caused to be mailed via the United States mails and in which you intentionally represented to the City and its auditors that the City's cash account balance at Refco in New York (where you worked) was over two and a half million dollars when in fact the City's account at Refco had slightly less than $3,000. In order to be guilty of an offense under 18 U.S.C. § 1341 you agree that you committed and the government could prove all of the following elements of the offense:

(1) that you participated in and aided and abetted a scheme or plan for obtaining money or property by making false statements or omissions to the City of Loma Linda on the audit confirmation;

(2) that you knew that the statements or omissions on the audit confirmation were false;

(3) that the statements or omissions were material and were of a kind or type that would reasonably influence the City of Loma Linda to part with money or property; that is to leave their funds under the care of your co-schemer, Steven Wymer;

(4) that you acted with the intent to defraud, that is that you had the intent or knowingly aided and abetted your co-schemer Wymer's intent to obtain money from the City of Loma Linda by deceiving the City; and

(5) that you used or caused the U.S. mails to be used to carry out the scheme.

By signing this agreement, you admit that you are, in fact, guilty of this offense and will enter your guilty plea before the Court.

MAXIMUM SENTENCE AND RESTITUTION

3. (a).The maximum sentence that the Court can impose is 5 years incarceration, a 3 year period of supervised release, a fine of $250,000 and a special assessment of $50 pursuant to 18 U.S.C. § 3013. If you are placed on supervised release following imprisonment and you violate one or more of the conditions of supervised release, you may be returned to prison for all or part of the term of supervised release, which could result in your serving a total term of imprisonment greater than the statutory maximum stated above. The Court can also order you to pay the costs of your imprisonment, community confinement and supervised release or probation. You understand that the cost of imprisonment in the Western District of New York is approximately $1,779 per month; the cost of community confinement is approximately $1,183 per month and supervised release or probation is approximately $195 per month. You understand that, should any of your sentence be served in community confinement, such a facility may assess up to 25% of your gross earnings over and above that amount assessed by the Court and should any part of your sentence be home confinement it is understood that the cost in the Western District of New York is $153.45 per month. You further agree to pay your special assessment before or on the date you are sentenced.

(b) By signing this agreement, you also agree that the Court can order you to pay restitution for the full loss caused by your activities. You understand that the government and you have not come to an agreement as to a restitution amount that may be imposed upon you at the time of sentencing.

However, it is recommended by you and the government that the amount of restitution ordered should not be in excess of the loss amount attributable to you as determined by the probation department. However, you agree and understand that should the Court impose a restitution order, it is not restricted to the amount alleged in the information to which you are pleading guilty. You further agree that any restitution imposed by the Court may not be discharged, in whole or in part, in any present or future bankruptcy proceeding.

FACTUAL BASIS

4. You and this Office agree and stipulate to the following statement of facts which form the basis, for the entry of the plea of guilty to the information and which also constitute relevant conduct pursuant to U.S.S.G § 1B1.3:

(a) Defendant Kimberly Goodman worked at Refco Securities, a broker/dealer, from the mid 1980's through early 1992. Through her work at Refco she came to know Steven Wymer, an investment advisor in Irvine, California. Wymer would cause individuals and municipalities from around the country to deposit excess or surplus funds under his companies' (Denman and Company and Institutional Treasury Management) control. He promised his clients a high rate of return in government securities. When clients invested, he had them send their money to Refco. Almost immediately he would raid those accounts and use one client's money to pay the other clients to whom he'd also promised a high rate of return.

(c) Because the accounting firms that audited the clients' financial condition would periodically ask for verification of the clients' account balances at Refco, it also became necessary for Wymer to enlist an insider at Refco to "verify" client balances when in fact, the clients had no money at Refco or significantly less than what Wymer had told them. For this purpose he turned to defendant Kimberly Goodman. Wymer had the clients send their

audit confirmation queries to Goodman's attention at Refco. With these queries the client cities requested verification of their account balances, securities held and interest paid on the cities accounts at Refco. The Refco responses prepared by defendant Goodman in New York (after consulting with the Wymer employee, in California, who had prepared the fraudulent monthly activity reports) were relied on by the cities and their auditors for projecting municipal spending.

(d) When defendant Goodman, in New York, received the cities' audit confirmation inquiries, she would telephone Wymer's office to ascertain what information the client city had been told by Wymer. Defendant Goodman would then place the false information (such as information concerning the client cities account balance) on the confirmation and would often fax a copy to Wymer's office to ensure that she was reporting the "correct" falsified information. Thereafter, defendant Goodman would sign her name to the audit confirmation and cause it to be placed in the U.S. mails where it was subsequently received and relied on by the client cities and their auditors.

(e) In the count alleged in the information, defendant Goodman on or about July 23, 1991 sent an audit confirmation response to the City of Loma Linda in which she represented that the city's cash account balance at Refco was $2,699,250.56. She received that false information from another co-schemer at Wymer's office in Irvine, California who kept a notebook containing the false information that was to be reported to the clients. The figure contained in the Wymer notebook was identical to the one that defendant Goodman reported to the City of Loma Linda. The information was false because at the time that defendant Goodman represented that balance to the City, the City of Loma Linda actually had slightly less than $3,000 in its account at Refco.

(f) Wymer made defendant Goodman gifts of two luxury automobiles (specifically a new Jaguar XJS and a new

Mercedes 560 SEL) during the pendency of the scheme from late 1987 through December 1991 when Wymer (who was subsequently convicted for a complex series of fraud schemes) was arrested. During that time, Wymer also funded a trading account at Refco that was in defendant Goodman's exclusive control, in a total amount of $178,000.

(g) A forensic handwriting examiner identified defendant Goodman's handwriting on the following documents which included:

(1) a June 20, 1989 audit confirmation for the City of Loma Linda which confirmed an account at Refco at a time when the City had no account at Refco;

(2) a July 19, 1989 audit confirmation for the City of Loma Linda which appeared to "verify" an almost 3 million balance in the City of Loma Linda's name at Refco when in fact there was less than $9,000, and

(3) an October 25, 1990 audit confirmation for the City of Loma Linda wherein defendant Goodman represented that the City of Loma Linda's account balance at Refco was over $2.6 million when in fact it was $2.00.

Further, the handwriting examiner also identified defendant Goodman as the writer of the July 23, 1991 audit confirmation for the City of Loma Linda which constitutes the basis of the single count information against defendant Goodman.

(h) A finger print analyst identified defendant Goodman's fingerprint on the October 25, 1990 audit confirmation response.

(i) The City of Loma Linda and its auditors relied on the information contained in the audit confirmations prepared by and mailed to them by defendant Goodman. But for the City's reliance on defendant Goodman's representations and omissions, the City would not have kept its funds under the supervision of Steven Wymer and would not have suffered an after recovery loss of less than $800,000 but more then $500,000. See U.S.S.G. 2Fl.l(b)(l)(K) (loss amount less than $800,000 but greater than $500,000.)

(j) Refco compliance officers would have testified that defendant Goodman should not have had client cities direct their audit confirmations to her and that she was acting improperly and not in accordance with Refco procedures when she contacted Wymer's office to receive the false account balance information which she relayed to the client cities. Moreover, Refco officials would have testified that it is a violation of company policy to receive cash payments and automobiles from clients/investment advisors.

SENTENCING FACTORS

5. You and the government agree and stipulate that the 1995 edition of the United States Sentencing Guidelines apply and do further stipulate to the following applicable sentencing guideline factors :

Base Offense Level	:	+ 6	[U.S.S.G. § 2Fl.l(a)]
Specific Offense Characteristics loss in excess of $500,000 but less than $800,0000	:	+10	[U.S.S.G § 2Fl.l(b)(1)(K)]
Adjustment for more than minimal planning	:	+ 2	[U.S.S.G. § 2Fl.l]
Minimal Participant Adjustment	:	(minus 4)	[U.S.S.G. 3Bl.2]

Acceptance of Responsibility: (minus 2) [U.S.S.G. 3El.1]

TOTAL OFFENSE LEVEL 12

Sentencing Table: 10 to 16 months (Zone C) if the court finds criminal history category one. (See paragraph 6 below.)

Both parties waive the right to argue that other specific offense characteristics, adjustments and departures may be appropriate except that the defense is not precluded from making and substantiating a departure request based on "extraordinary family circumstances" pursuant to the policy statement contained in U.S.S.G § 5Hl.6. The government reserves the right to argue against that request.

6. You understand that there is no agreement as to your criminal history or criminal history category, and that your criminal history could alter your offense level if you are a career offender or if the instant offense was a part of a pattern of criminal conduct from which you derived a substantial portion of your income. In the event your offense level is so altered, the parties are not bound by the sentencing factors stipulation set forth in paragraph 5 above.

7. You understand and agree that neither the United States Probation Office nor the Court is bound by the stipulations referenced in this agreement and that the Court will, with the aid of the presentence report, determine the facts and calculations relevant to sentencing. You further understand that both you and this Office are free to supplement these stipulated facts by supplying relevant information to the United States Probation Office, and this Office specifically reserves its right to correct any and all factual misstatements relating to the calculation of your sentence. You understand that the Court cannot rely exclusively upon the parties' stipulation in ascertaining the factors relevant to the determination of your sentence. Rather, in determining the factual basis for the sentence, the Court will consider the stipulation, together with the results of the

presentence investigation, and any other relevant information. You understand that if the Court ascertains factors different from those contained in the stipulation, you cannot, for that reason alone, withdraw your guilty plea. You further agree that in the event the Court's sentencing calculations are different than those set forth in paragraph 6 above, the neither party will appeal the Court's decision.

CONSIDERATION BY OFFICE

8. In exchange for your guilty plea and your complete fulfillment of all of your obligations under this agreement, this Office agrees:

a) To recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to sentencing guideline 3El.1, if you demonstrate an acceptance of responsibility for this offense by virtue of your conduct up to and including the time of sentencing; and b) To not prosecute you for any other fraudulent conduct stemming from your interaction with defendant Steve Wymer from 1987 through 1992.

AT SENTENCING

9. When you appear before the Court for sentencing, the Government will bring to the Court's attention all other relevant information with respect to your background, character and conduct, including the conduct for which you have not been charged involving your actions with coconspirator Steven Wymer. Further, the Government will be entitled to bring to the Court's attention and the Court will be entitled to consider your failure to fulfill any of your obligations under this agreement.

WAIVER OF CONSTITUTIONAL RIGHTS

10. You understand that by pleading guilty, you will be giving up the following Constitutional rights: You have the right to plead not guilty and the right to be tried by a jury or a court if you waive your right to a jury trial. At a trial, you would have the

right to the assistance of counsel and if you could not afford an attorney, the Court would appoint one to represent you. During the trial, you would be presumed innocent and a jury would be instructed that the burden of proof is on the government to prove you guilty beyond a reasonable doubt. You would have the right to confront and cross-examine witnesses against you. If you wish, you could testify on your own behalf and present evidence in your defense. On the other hand, if you did not wish to testify or present evidence, that fact could not be used against you and a jury would be so instructed. You would also have the right to call witnesses on your behalf. By pleading guilty, you will be giving up all of these rights. By pleading guilty, you further understand that you will be waiving any and all rights to pursue any applicable affirmative defenses, any Fourth Amendment or Fifth Amendment claims, and any other actual or potential pretrial motions previously filed or to be filed. Finally, by pleading guilty, you understand that you may have to answer questions posed to you by the Court both about the rights that you will be giving up and about the facts of this case. Any statements made by you during such a hearing could be used against you in a criminal prosecution for perjury or false statements.

WAIVER OF APPEAL

10. You understand that Title 18, United States Code, Section 3742 gives you the right to appeal the sentence imposed by the Court. Acknowledging this, you knowingly and voluntarily waive your right to appeal any sentence (including any aspect of the sentence ordering you to make restitution) imposed by the Court and the manner in which the sentence is determined so long as your sentence is within the statutory maximum specified above.

11. This agreement does preclude the Government from appealing the sentence imposed by the Court.

PARTIES TO AGREEMENT

12. You understand that pursuant to Rule 11 (e)(l)(B), the

Court is not a party to this agreement and the Court is under no obligation to accept the Government's recommendation regarding the sentence to be imposed. Further, even if the Court disregards this Office's recommendation and/or imposes any sentence up to the maximum established by statute, you cannot, for that reason, withdraw your guilty plea, and will remain bound to fulfill all of your obligations under this agreement. You understand that neither the prosecutor, your attorney, nor the Court can make a binding prediction or promise regarding the sentence you will receive.

BREACH OF AGREEMENT

13. If you commit any crimes or if any of your statements to the court or testimony prove to be false, misleading or materially incomplete, or if you otherwise violate this Agreement in any way, the Government will no longer be bound by its representations to you concerning the limits on criminal prosecution or sentencing recommendation, as set forth above. Further, you shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by you before or after this Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement, you waive any and all rights in the foregoing respects. Finally, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against you in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. You agree to waive any and all defenses based on the statute of limitations with respect to any prosecutions that are not time-barred on the date you sign this Agreement.

NO ADDITIONAL AGREEMENTS

14. Except as expressly set forth herein, there are no additional promises, understandings or agreements between the government and you or your counsel concerning any other criminal prosecution, civil litigation or administrative proceeding relating to any other federal, state or local charges that may now be pending or hereafter be brought against you, or the sentence that might be imposed as a result of your guilty plea pursuant to this Agreement. Nor may any additional agreement, understanding or condition be entered into unless in writing and signed by all parties.

15. This agreement is not contingent in any way upon the outcome of any investigation, proceeding, motions hearing or subsequent trial.

If a fully executed copy of this agreement is not agreed to and adopted by October 3, 1996, it will be automatically withdrawn and thereafter of no legal effect or force.

This agreement shall be effective upon execution by you and this Office.

AGREED AND ACCEPTED

UNITED STATES
ATTORNEY'S OFFICE

CENTRAL DISTRICT
OF CALIFORNIA

NORA M. MANELLA
United States Attorney

JULIE WERNER-SIMON
Assistant United
States Attorney
Central District of California

UNITED STATES
ATTORNEY'S OFFICE

WESTERN DISTRICT
OF NEW YORK

PATRICK H. NEMOYER
United States Attorney

ANTHONY BRUCE
Assistant United
States Attorney
Western District of New York

I, Kimberly Goodman, have read this agreement and have

carefully reviewed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to each of the terms. Before signing this agreement, I consulted extensively with my first attorney, James Moss and with my current attorney, Joseph Mistrett. Both of my attorneys have fully advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No other promises or inducements have been made to me, other than those contained in this agreement. Furthermore, no one has threatened or forced me in any way to enter into this agreement. Finally, I am very satisfied with the legal representation of Mr. Moss, my first attorney who initially negotiated this plea agreement and I am also very satisfied with Mr. Mistrett, who is now representing me and who will be handling my plea of guilty and my sentencing in this case.

Date

KIMBERLY GOODMAN
Defendant

I am Kimberly Goodman's attorney. I have carefully reviewed every part of this agreement with my client. I have also discussed this case with her former attorney, Mr. James Moss. In addition, I have fully advised my client of her rights, of possible defenses, of the Sentencing Guideline provisions, and the consequences of entering into this agreement. My client's decision to enter into this agreement is an informed and voluntary one. I believe it is in her best interest.

Date

JOSEPH MISTRETT
Counsel for Defendant
Kimberly Goodman

APPENDIX F

for the Central District of California

United States of America

Criminal No. CR 96-631

v.

Kimberly Goodman

Consent to Transfer of Case
for Plea and Sentence
(Under Rule 20)

I, Kimberly Goodman, defendant, have been informed that a information (indictment, information, complaint) is pending against me in the above designated cause. I wish to plead guilty (guilty, nolo contendre) to the offense charged, to consent to the disposition of the case in the Western District of New York in which I_____ (am under arrest, am held) and to waive trial in the above captioned District.

Dated: 7/16, 1996 at _____

*(Defendant)*Kimberly Goodman

_____

(Witness)

_____

(Counsel for Defendant)JAMES MOSS

Approved

PATRICK H. NeMOYER
BY: ANTHONY M. BRUCE,
Asst. U.S. Attorney
United States Attorney for the
Western District of _____
New York

NORA M. MANELLA
BY: JULIE WERNER-SIMON
United States Attorney
for the Central District
of New York California

APPENDIX G

Excerpts of Transcript - Sentence Conference Transcript dated 1/13/97

agreement -- what is in the plea agreement. You cannot read that plea agreement and come up with anything without -- without coming to the conclusion that she's not entitled to any reduction in her role in the offense. It just doesn't add up. The evidence in the plea agreement clearly supports that she not get a minimal four-level or three-level or two-level reduction. here's no evidence in that plea agreement that would support any such reduction. So I want -- I'm going to give both sides and the probation office is being directed to give me a full report on the role in the offense. I also want to know more about what -- do we have a full story in all the relevant conduct? I don't know whether I -- I may very well have. And Mr. Mistrett, was she interviewed by the probation office?

THE PROBATION OFFICER: Yes, your Honor she was interviewed by Officer Kretzer.

MR. MISTRETT: Yes, Judge.

THE COURT: All right. Just one second please. I want to read that to you.

I became a registered representative of series 7 licensed broker in New York City and worked for a firm called Refco, a commodities brokerage firm. Steve Weimer became a futures and options client of the desk I serviced. It was my job to train him and educate him on

Excerpts of Transcript - Sentence Conference Transcript dated 1/13/97

Whatever happened to the cars? I mean that's -- you're talking about a Mercedes 560. That's not at the low end. A Mercedes 560 goes for over a hundred thousand dollars. A Jaguar, we're talking about, is over 60 thousand dollars plus all the other taxes that are involved in that. It's a 200 thousand proposition here, just on the automobiles. Forget the 170 something. If the loss is 500 to 800 thousand dollars and we're adding the cars -- and assume she got no other benefit -- if that's true, add this mystery 170 something she almost got the full benefit of the whole entire loss. What are we talking about? Forget the hundred million dollars. I'm talking about the 500 to 800 thousand dollars.

MR. BRUCE: Judge, as I understand the position of the Second Circuit, if we're looking solely at her — at her conduct, she can't be a minor or a minimal participant, and that is where I think the Court is going.

THE COURT: Do you think that she, based on this plea agreement, those facts, that she would be entitled to any reduction?

MR. BRUCE: Based upon the 700 thousand, no.

THE COURT: Just read the plea agreement, Mr. Bruce. I know you didn't handle the plea, I know it was worked out in California. You look at the plea agreement, there's no way that you can justify a reduction of four

THE COURT: I want to know what your position is, Mr. Bruce, since you're an Assistant United States Attorney in the Western District of New York.

MR. BRUCE: We are essentially here, Judge, as of counsel to the U.S. Attorney's for the Central District of California, and we adopt their position.

THE COURT: All right.

MS. WERNER-SIMON: Your Honor, if I may?

THE COURT: Yes, you may.

MS. WERNER-SIMON: I filed that document. I wrote that document, and that document in order to be timely was faxed -- typed in my office and faxed here so that this office could file

it timely with the court's order. So, I take full responsibility for all statements contained in that document, Your Honor. If I may address the Court with respect to some issues, Your Honor, has brought up.

With respect to the Lewis case, I urge you under Lewis to consider solely the Loma Linda scheme, and to make your analysis solely on the Loma Linda scheme, The reason why I do that is; in the Lewis case, we're talking about an individual who, although, was involved in an overall tax scheme, ended up being charged in solely a conspiracy limited portion, and then this circuit talked about whether we could get a role adjustment. We're looking at the Lewis case in the light of the Schanooby case.

APPENDIX H

Government Presentence Memo

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

96-CR-115-A

v

KIMBERLY GOODMAN,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES

PATRICK H. NeMOYER
United States Attorney
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202

ANTHONY M. BRUCE
Assistant United States Attorney
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

96-CR-115-A

KIMBERLY GOODMAN,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES

THE UNITED STATES OF AMERICA by and through its attorneys, Patrick H. NeMoyer, United States Attorney for the Western District of New York, and Anthony M. Bruce, Assistant United States Attorney, hereby files its memorandum setting forth the points and authorities to which the Court must look in determining if the "abuse of trust" Guideline (Guidelines § 3B1.3) and/or the "acceptance of responsibility" Guideline (Guidelines § 3E1.1) apply in this case.

PRELIMINARY NOTE

At the outset, we note that paragraph 5 (p.12) of the Plea Agreement precludes the Government from "the right to argue that other specific offense characteristics, adjustments or departures are applicable to this case." Thus, in submitting this memorandum, our purpose is simply to supply the Court with the facts and the law. However, in accordance with the Plea Agreement, neither the Court nor counsel should view this Memorandum as advocating a position by the Government on either issue addressed herein. With this proviso, we believe that the Court could find that defendant Goodman's conduct technically constitutes an. "abuse of trust" even if the Court finds that defendant Goodman did not have a fiduciary duty running to the City of Loma Linda and that "abuse of trust" was not included in the specific offense characteristics as articulated in United States v. Jolly, 102 F.3d 46, 48 (2d Cir. 1996). In addition, we believe the Court could find that defendant Goodman's attempt to

withdraw her plea militates against her receiving a reduction to her base offense level for "acceptance."

ANALYSIS

A. Abuse of Trust

Guidelines § 3B1.3 states as follows:

> If the defendant abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense increase by 2 levels.

Prior to 1993, when § 3Bl.3 was amended, courts asked whether the defendant occupied a superior position relative to all people in a position to commit the offense. *United States v. Brown*, 941 F.2d 1300 (5th Cir. 1991) cert. denied, 502 U.S. 1008 (1991). The 1993 addition of application note 1 amplifies on the circumstances under which the enhancement is appropriate. It states as follows:

> "Public or private trust" refers to a position of trust characterized by professional or managerial discretion (i.e. substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission of the offense (e.g. by making the detection of the offense or the defendant's responsibility for the offense more difficult) . This adjustment, for example, would apply in the cases of embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

The Second Circuit has viewed this language in a somewhat restrictive way. It has deemed that a typical

commercial relationship, wherein a defendant is privy to certain documents utilized in the crime, does not warrant application of the enhancement. *United States v. Viola*, 35 F.3d 37 (2d Cir.), cert. denied,__U.S.__,115 S.Ct. 1270 (1994) (machine operator at cargo facility did not occupy a position of trust even though his position as an employee gave him access to certain documents he inspected). In Jolly, a mail fraud case, the Second Circuit held that a corporate president who procured loans from investors through fraud did not have a fiduciary relationship with the victims, and reversed the district court's application of a two point enhancement for abuse of trust. The court construed Jolly's relationship as a contractual one wherein defendant had influence over the investors, but not of the type "beyond garden-variety borrowers." Id. at 48. It also held that where the fraud occurs in non-fiduciary, arms length relationships, the trust that is abused is simply the reliance of the victim on the misleading statements or conduct of the defendant and thus, is included in the specific offense characteristic for the offense.

Goodman's situation can be distinguished from that of the defendant in *Jolly*. Under the facts of this case, the Court could find that she was, in fact, a fiduciary. The City of Loma Linda did not loan its money to Refco as an investor. Rather it utilized Refco's services as one would use a bank, that is, to house the funds which it thought Weimer was using for investment. Thus, Goodman, as an employee of Refco, had duties that differed from those of the defendant in *Jolly*. The part of Goodman's job that brought her into this case as a defendant was her ability to intercept the audit confirmation statements and then falsely confirm to the City's auditor Loma Linda's balance in its account at Refco. The City relied on these misrepresentations and had no other source from which to verify the information she relayed to them. Thus the Court could find this to be a misuse of the discretionary authority entrusted to her by the victim city and could find this conduct constitutes an abuse of her position of trust vis-a-vis Refco's client, the City of Loma Linda.

Another component of the abuse of trust guideline is the requirement that the defendant's position "significantly facilitate"

the commission of the offense. This turns on whether the defendant's position increased the chances of succeeding or avoiding detection. See *United States v. Fritzson*, 979 F.2d 21 (2d Cir. 1992) (defendant's role as accountant assisted his tax fraud, even though someone without his training could have attempted it). Where an individual uses his knowledge of his field and parlays it into criminal activity, the enhancement could apply. (*United States v. Harris*, 38 F.3d 95 (2d Cir. 1994), cert. denied,__ U.S.__, 115 S.Ct. 1269 (1995) (in course of investment fraud, lawyer had one investor execute a power of attorney, drafted a codicil to another investor's will, and prepared documents for other investors to execute) . Certainly, the facts of this case would support a finding by the Court that defendant Goodman's conduct, the creation of the false performance reviews, is evidence of her facility in deceiving the City. Her conduct impeded the City's ability to uncover the fraud. Had she not falsified the information, it is highly probable that the City would have become aware of the fraud at an earlier date and minimized its losses. And it is also highly probable that Stephen Weimer's entire scheme would have been uncovered well before it was.

B. Acceptance of Responsibility

Guidelines § 3E1.1, inter alia, states:

(A) If a defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels; (b) if the defendant qualifies for a decrease under subsection (a) , the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted the authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

> (1) timely providing complete information to the government concerning his own involvement in the offense; or
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the court to allocate its resources efficiently, decrease the offense level by an additional level.

It is the sentencing judge who is in the unique position to evaluate a defendant's acceptance of responsibility. Such a determination is entitled to great deference on review and will not be disturbed unless it is without foundation. *United States v. Boothe*, 994 F.2d 63, 70 (2d Cir. 1993) and Guidelines § 3El.l application note 2). Acceptance of responsibility entails a showing of genuine remorse; however it should not be denied to a defendant who admits guilt but seeks an adjudication as to the extent of his sentence.

It is the defendant who bears the burden of proof with respect to the acceptance adjustment. The determination as to the applicability of the adjustment is a fact-driven issue in which credibility and demeanor play a critical role in determining whether a person is genuinely contrite. *United States v. Roger*, 895 F.2d 28 (lst Cir. 1990). It requires a balancing of subjective and objective factors. *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989) .

The adjustment has been applied in instances where a defendant has pled guilty. See *United States v. Russell*, 913 F.2d 1288 (8th Cir. 1990) , cert. denied, 500 U.S. 906 (1991) ("[n]othing in the Guidelines requires the district court to find that a defendant exhibits any of the specific listed objective acts if it finds that he has accepted responsibility. . . Therefore, if a defendant pleads guilty for the offense that he or she committed, the district court may find that the defendant's guilty plea justifies the two level reduction.") But a defendant is not entitled to the two point reduction as a matter of right by pleading guilty. *Roger*, 895 F.2d at 29-30.

It is appropriate, in certain instances where a defendant has attempted to withdraw his or her plea, to deny the acceptance of responsibility reduction. *United States v. Reyes*, 13 F.3d 638 (2d Cir. 1994) (defendant in cocaine conspiracy case moved to withdraw plea after receipt of PSR and was denied acceptance of responsibility adjustment); see also *United States v. Muriel*, 111 F.3d 975 (lst Cir. 1997) (no abuse of discretion in denying acceptance of responsibility reduction where defendant attempted to withdraw plea); *United States v. Newson*, 46 F.3d 730 (8th Cir

1995) (defendant's assertion that attorney incorrectly gave him the impression that he would face a more severe sentence by going to trial was not sufficient ground to withdraw plea and an attempt to withdraw plea on those facts obviated the defendant's demonstration of acceptance of responsibility); *United States v. Haddad*, 976 F.2d 1088 (7th Cir. 1992) (defendant admitted crime but presented entrapment defense, denied acceptance of responsibility because cf such a position was "in total denial of his obligations."); cf. *United States v. Negron*, 967 F.2d 68 (2d Cir. 1992) (in drug case, since quantity is not an element of the offense, a defendant who admits guilt but requests determination as to quantity of narcotics with which he should be personally charged should not, on that account alone, be denied the adjustment.)

Thus, the facts exist for the Court to find that the acceptance of responsibility reduction under Guidelines § 3El.ldoes not apply.

III. CONCLUSION

It is this Court's prerogative as to whether to enhance defendant Goodman's sentence for abuse of trust or to reduce it due to acceptance of responsibility. In accordance with the plea agreement, the Government takes no position as to these issues.

Dated: Buffalo, New York, July 15, 1997.

PATRICK H. NeMOYER
United States Attorney
Western District of New York
138 Delaware Avenue
Buffalo, New York 14020
BY: _____
ANTHONY M. BRUCE
Assistant U.S. Attorney

APPENDIX I

Excerpts of Transcript - Sentence Conference Transcript dated 1/13/97

five years later.

THE COU T: How was that done?

MR. MISTRETT: I asked that question of Mr. Bruce. I don't know.

THE COURT: It's not legally possible.

MR. MISTRETT: That's why I asked the question, Judge.

THE COURT: Well, I'd like to know because he's -- apparently has been involved with Miss Goodman, so I'd like to know. I mean, was it a 5K1? That would only be a year.

MR. BRUCE: Judge, I don't know. I honestly do not know. I know it was cut in half from 14 to 7.

THE COURT: Six years into the sentence?

MR. MISTRETT: Approximately five.

PROBATION OFFICER: Your Honor, he was sentenced on May 11, 1993 to 175 months. He was re-sentenced on April 18, 1996 pursuant to Rule 35 to 87 months.

MR. MISTRETT: Okay. But that was three years later, Judge.

MR. BRUCE: You can do a Rule 35 after the one 22 year if he --

THE COURT: After the one year?

MR. BRUCE: In a very limited area, if he comes up with information that was unknown to him at the time he

APPENDIX J

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

...judges on the record say that they -- they're constrained. They do no like it. They do not appreciate the guidelines, and it has happened -- it happens with frequency in the Central District of California. And what they're really talking about is when the guidelines intersect with the mandatory minimum in drug cases under the -- the drug act, which then sets the bottom for the mandatory minimum where the guidelines, the fluidity, the flexibility of the guidelines can't be taken into effect, and where the offender is -- does not fall within the recent revision of the safety valve provision.

What I meant by that was, this isn't a drug case. This is a case where the guidelines work well, because they afford flexibility. They afford flexibility —

THE COURT: One of the problems with guidelines, and you're going to find out in the recent amendment, there is a big increase in white collar crime. Because the guidelines, by and large, the consensus is that they're too lenient in this area of fraud.

So, you're going to see a major shift, probably in November of this year. I believe the proposed amendments are out now, and there's going to be a big increase, because in this area, it's been determined that the guidelines, the calculations are too lenient.

They may be too strict in the drug area, but in this area here, it turns the other way around.

APPENDIX K

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

MS WERNER-SIMON: Well, what I was --

THE COURT: And most judges feel that way.

MS. WERNER-SIMON: What I was trying to say, Your Honor, and what I meant was, that this isn't a mandatory minimum drug case. That was the light in which I was -- that this case, because of its nature and because of 3Bl.2, affords flexibility, I was thinking of Chapter 3 specifically. I was thinking of, in this case, one can -- I was thinking of the guidelines affords flexibility Such as under Chapter 3.

Unlike other systems, this mandates that the Court look at the victim under 3A. You look at the defendant's role under 3B. You look at whether there's obstruction under 3C, and I was trying to say that this, unlike the drug cases, is a place where the guidelines can afford flexibility to address rightfully, and I can --

THE COURT: Intellectually, you apply the guidelines-- if you apply the guidelines as they are intended to be -- but to manipulate the facts or to twist facts in a way that's slanted in one direction, isn't correct. Isn't the right way to do it .

MS. WERNER-SIMON. What I was thinking of was application note one. Application note one talks about when you assess the minimal participant role. It talks about an individual who --

THE COURT: To rarely use.

MS. WERNER-SIMON. Yes, Your Honor.

THE COURT: And yet you say this is a perfect case for it.

MS WERNER-SIMON: Yes, I do, Your Honor. Your Honor? Your Honor, application note two, the language that I was relying on when I made this argument and wrote this, is that, the individuals who are among the least culpable, are among, not the least culpable, but are among the least culpable in the involvement. And in focusing on just this particular scheme, it is

my opinion, and for whatever it's worth, which obviously, you have every right to discard and say I have no merit or things are done differently somewhere, and you can totally disregard what I have to say, but that was my analysis. I was looking at application note one, and these words, where unlike a drug case where when I used to do organized crime in drug cases, this afforded incredible flexibility in terms of my perception. My perception, not yours, not probation, but my perception of her culpability, and I looked at the words, "are among the least culpable", not the least culpable, but are among the least culpable; and I looked at everyone's role and I spent time, you know, before I left the office, briefly, for purposes of my appointment. I spent time, actually, several days or like eight days preparing the notebook for Your Honor, drawing the chart, assessing, trying to quantify this individual's role. Looking at the documents, looking at -- to see whether even, you know, the statements by other agencies had support, and coming up with the white notebook, and I did that in the light of "are among" .

Then the other thing with respect to application note one when I looked at it, I looked at the language. I looked at the language; has she or he demonstrated a lack of knowledge or understanding of the scope and structure of the enterprise and the activities of the others involved. That's what it says, when I looked at the application --

THE COURT: You're talking overall conspiracy?

MS WERNER-SIMON: It says --

THE COURT: You're talking about the hundred million dollar fraud?

MS. WERNER-SIMON: No. I'm looking at it in the light of this scheme, which I could prove by a preponderance. That's what I'm looking at it under.

THE COURT: Where the plea agreement says the amount of losses --

MS. WERNER-SIMON: Approximately, that amount. I cannot -- if I may, Your Honor, I'll look for you. The $770,000 amount.

THE COURT: How much did she get?

MS. WERNER-SIMON: Of that?

THE COURT: Yes.

MS WERNER-SIMON :She didn't get any of that. She...

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

THE COURT: "Off-loading packages by moonlighters, carrying drugs in secret compartments of clothing surely is more obviously criminal than signing documents as requested by a prize client of your employer". Ma'am, I don't know where you're coming from.

MS. WERNER-SIMON: What I was doing, Your Honor, is talking about the example that is given in the guidelines, which is the drug example, and how there is no fraud example. And the guidelines talk about, in the cases in this circuit, talk about the in-depth analysis and the examples here are with respect to the drug cases. The application notes talk about drug cases. It talks about the drug defendant. It says here in application note two, which is what I was addressing, application note two, my statements were made to support the position of infrequency.

Your Honor, I can only remember two or three occasions where I have -- that I can remember -- thought a defendant in, federal prosecution since '86, where defendants, as I can recall, warranted a minimal role. I have never written a plea agreement --

THE COURT: The probation office disagrees with you.

MS. WERNER-SIMON: Yes, Your Honor, that's correct. They do. Yes. And that is why I'm here in Buffalo.

THE COURT: Probation officer on the last page entitled, "Change in guideline calculations" says "in reviewing the court the minimal role, as noted in application note two, indicates that this adjustment is to be used infrequently, and generally applies to a person who is involved in a single incident". We don't have that here either, do we?

An argument may be -- "an argument may able to be made in comparison to everyone else in the whole conspiracy, she had a minimal role. In this officer's view, the argument would even be weak by the simple fact that a two level upward adjustment was made for more than minimal planning. The defendant's participation in the scheme span a significant period of time and involves many transactions, regardless if it was done with criminal intent.

However, the defendant is not being held accountable for the whole conspiracy, simply being held accountable with the scheme, within the twenty-five scheme conspiracy. Given this

consideration a four level downward adjustment does not seem warranted. However, it is clear that even considering just the Loma Linda scheme, there were others involved with greater levels of culpability than the defendant. Despite the fact that her participation spanned a twenty-five month period of time and involved at least five documents, a minor role reduction isn't warranted".

MS. WERNER-SIMON: And I was responding, Your Honor, to that application note four when I discussed the analogy with the marijuana conspiracy. Ms Goodman by her own admission

APPENDIX L

Excerpts of Transcript - Sentence Conference Transcript dated 1/13/97

THE COURT: Hundred Federal judges, probably all the sentencing commissioners, and we discussed the application of the guidelines. And one of the things that was made clear by everyone is that fora proper and correct and fair application of the guidelines all the facts have to be presented, in order for everyone to be treated -- so no matter where you are or who you are, what, your background is, be treated somewhat the same. And the Department of Justice made a representation -- I think the second ranking person in the criminal division -- that the Department of Justice has sent out directives that all information should be available to the Court, that all relevant conduct should be made available, that plea agreements should in no way at all be manipulated or tailored to get a particular result, that the result will have to be where it is based on all the factors. And in going over this report and discussing this issue last week, I don't think that they're in sync. Therefore I think in all fairness to everyone, since you weren't aware that I had serious concerns, I'm going to direct the probation office to give me a full report on all the activities involving this gentleman in California, her involvement, her role, her activities, everything she did because I don't get the drift of that from this report. I want a detailed explanation as to why the plea levels, hardly maybe even two levels. I don't see any reduction at all. Im not suggesting that it should be increased, but this whole activity could never have taken place, in this fraud, without her help. It could never have happened, but for her providing that false information, this could not have happened, this 500 to 800 thousand dollars. That's hardly someone who has an insignificant role or minimal role or a minor role. She was an integral part of this particular fraud based upon the facts in the plea agreement. That's the only analysis that I can determine from reading this report- and from reading the plea agreement. I don't know whether we had a discussion about this

during the plea colloquy or not about the role in the offense.

MR. MISTRETT: As I recall, no, but as Mr. Bruce had indicated and I think wisely, had asked Ms. Werner-Simon to come here because we all know, Judge, those of us who appear in front you, your concerns especially in this area, and he had her fly here from California.

THE COURT: My concerns are only to be fair and -- to properly apply the guidelines consistently with every case that I have.

MR. MISTRETT: I wasn't suggesting otherwise.

THE COURT: I would like to

APPENDIX M

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

What is the defendant? Focusing on the Loma Linda transaction, which is the one that I can prove by a preponderance. What -- and if something should happen to the plea, what would the Government be going to trial on? The Loma Linda transaction.

With respect to Refco, Refco was only the house, the custodial bank of a portion of the Loma Linda fund. Loma Linda funds were in other banks. I believe it's through specific other entities, so that the Refco funds that were lost, come out to the mount that we were discussing, the seven hundred plus thousand, and that's where that continues to start; between $1,8 million and seven hundred and seventy plus thousand dollars, And Ms, Goodman was only the employee of Refco. She had no dealings with the other trades, with the other -- with Loma Linda's money at any other houses where Loma Linda's money was.

THE COURT: What was the loss to Loma Linda?

MS. WERNER-SIMON: 1.8 million. Overall from all the Wymer schemes, but --

THE COURT: We're talking about this scheme.

MS, WERNER-SIMON: This, $770 -- .

THE COURT: $773,000.

MS. WERNER-SIMON: Yes, Your Honor, said the forensic accountant.

THE COURT: And how much did she receive?

MS. WERNER-SIMON: Now, your question, which I'll take out of order that I was going to respond to, is a good question in that, what do we look at? You are focusing on, as is correct, what is the illegitimate aspect of the scheme?

Ms. Goodman was involved in the legitimate aspect of the scheme -- pardon me, of the operation. She was the trader. She worked at a desk, had various roles at Refco with respect to Wymer and with respect to this particular client.

Now, the question you queried Mr. Mistrett was; "Mr.

Mistrett", you asked, "Do you contest that she received these items for her assistance"? Then he said, I do not -- "I do",and then you asked again, "Do you contest she received these for her involvement with Wymer"? He said he did not.

Well, looking at it in the light of the defendant, she, and as the evidence has shown, received these items in part because of the legitimate aspect of the relationship. There were legitimate aspects to Loma Linda. Loma Linda and other individuals, the other individual cities, but focusing on solely on Loma Linda, she -- how do we know --

THE COURT: The loss attributable is $508,000 calculated for the adjustment role.

MS. WERNER-SIMON: Correct. I mean, we look at that and joint participation, and under the joint participation analysis, that's the number forensic accountants have determined.

So, if I may take it just one step further, how do we know that Ms. Goodman -- what evidence do we have that Ms. Goodman was acting consistent with her state of mind, that this was under the legitimate aspect of the relationship of Loma Linda; that Loma Linda did have an account; that Mr. Wymer was a prize client? Well, the most significant piece of evidence to me inthat assessment is, what Mr. Mistrett brought out in his papers and also in argument today, which is if he'd elicit -- if it is improper, why then would she publicize it and seek out counsel's guidance to determine whether it is proper for brokers or people working with trading desks, which are regulated to receive gifts, and as you find, again, focusing on this aspect, the Loma Linda aspect and the others, you'll see it was a course of conduct of Mr. Wymer to give gifts to everyone of significance -- of a significant nature.

THE COURT: Well, the people were aiding in a scheme to defraud.

MS. WERNER-SIMON: No, not necessarily.

THE COURT: Well, all but.-- but a good portion.

MS. WERNER-SIMON: Yes, but you asked me to all people. At this point, gifts to client cities, gifts to auditors, gifts to -- and yes, to those who are part of his network and operation, gifts of significant value.

So, with respect to that, you also asked about Ms. Goodman and her participation at Refco and others involved in Refco. There were others, and this is civil litigation which is...

APPENDIX N

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

THE COURT: -- that this is true.

MS WERNER-SIMON: That's right.

THE COURT: That he gave, apparently, "the Trader" , and I'm assuming it's Ms. Goodman, $150,000 in cash and 100,000 in jewelry.

MS. WERNER-SIMON: Your Honor, I can attest that that information was stated at a point of the investigation, which was -not focusing on --

THE COURT: Why do you disbelieve it?

MS. WERNER-SIMON: Why do I?

THE COURT: Well, some things Wymer says are true. Some things are not?

MS WERNER-SIMON: Yes .

THE COURT: Why do you disbelieve that?

MS WERNER-SIMON. Because there's no more evidence other than Mr. Wymer' s - -

THE COURT: Why would the Government put it in its papers?

MS. WERNER-SIMON: Because the Government at that time believed it under penalty of perjury, and I, as a person, evaluating the Goodman case --

THE COURT: What do you have to prove that it didn't happen? Why don't you believe it now?

MS. WERNER-SIMON: Because in this instance, I believe Ms. Goodman over Mr. Wymer having read, unlike the

APPENDIX O

Decision and Order of United States District Court dated 8/18/97

internal quotations omitted).

Even the fact that a defendant played a minor or minimal role in the offense vis-a-vis the role of her coconspirators is insufficient, in and of itself, to justify a reduction under this section. The defendant must have similarly played a minor or minimal role in comparison to the average participant in such a crime. Id.; United States v. Ajmal, 67 F.3d 12, 18 (2d Cir. 1995). In other words, a defendant's role in the offense is to be assessed not only in the light of her relationship to her associates, but also in light of the elements of the offense of conviction, for it is not the intent of the Guidelines to reward a guilty defendant with such an adjustment merely because her coconspirators were even more culpable. United States v. Thompson,76 F.3d 442, 457 (2d Cir. 1 996).

Defendant argues that she should be given a four-level downward adjustment because she was a minimal participant in Wymer's overall conspiracy. She argues that the loss to City of Loma Linda was when compared to the overall loss of $100 million resulting from Wymer's various fraudulent schemes. The Court finds this argument without merit. Defendant's base offense level was calculated on the basis of her limited role in the City of Loma Linda scheme, and not on the basis of the entire Wymer conspiracy. Thus, any type of downward adjustment under §381 .2 based on defendant's role in the overall Wymer conspiracy would be inappropriate. See United States v. Lewis, 93 F.3d 1075, 1085 (2d Cir. 1996). United States v. Gomez, 31 F.3d 28, 31 (2d Cir. 1993).

Both the defendant and the government argue that defendant was a minimal participant even if her conduct is viewed only with regard to the City of Loma Linda scheme. This position, however, is not supported by the facts. Defendant played an integral role in the success of Wymer's scheme to defraud the City

of Loma Linda. On a number of occasions over an extended period of time, she provided the City with false audit confirmations knowing that the City would rely on those confirmations. Her role was pivotal to Wymer's ability to conceal his fraud .from the City so that he could continue stealing the City's money. As stipulated to in the plea agreement, "but for" defendant's conduct, the City would have discovered that Wymer was looting their funds much earlier and would have been able to avoid such a significant loss.

Although defendant now insists that she had no criminal intent and that she merely failed to exercise due diligence in reviewing the audit confirmations[5] she admitted in her plea agreement that she knew the statements or omissions on the audit confirmations were false and that she took affirmative steps to "verify" the false audit confirmations with Wymer and his associates. Defendant cannot now back away from these admissions. Because defendant was aware of both the real account balances maintained at Refco and the fake account balances provided to her by Wymer, the Court finds that she knew the scope of the City of Loma Linda fraud scheme. Thus, the evidence clearly shows that defendant was aware of both the nature and scope of the scheme to defraud the City of Loma

---

[5]See PSR at ¶ 14 ("I am here today because I did not act with the due diligence required by the rules and regulations of my licensing agent."); Memorandum from Probation Office, dated April 18, 1997, at 4-5 ("[Defendant] recognizes and accepts that her actions/behavior[] facilitated Wymer's schemes. She accepts total responsibility for her lack of due diligence, attention to detail, and attention to standard operating procedures. She recognizes this as having been wrong on her part and a dereliction of duties. However, during the course of the scheme, although knowing corners were being cut, she advises she did not act with criminal intent/knowledge.").

Linda.

When viewed in isolation, the City of Loma Linda scheme was really nothing more than a simple fraudulent embezzlement scheme. Wymer duped the City into investing its money with him. He directed the City to deposit its money with Refco, which acted more or less like a bank. Defendant then falsely reported to the City that its money was still in its account at Refco, when, in reality, she and Wymer had taken the money for their own purposes. While Wymer may have been more culpable and certainly profited more from the scheme, defendant has failed to prove that where she was less culpable than the average participant in such a crime. Indeed, the fact that she received over $300,000 in illegal profits from a scheme that resulted in a loss of $773,789 would seem to weigh heavily against any type of role reduction.[6]

The parties have also suggested that the defendant should be given a minimal role because, had she not assisted Wymer. Wymer would have just gotten someone else to assist him. However, not any "Tom, Dick or Harry" off the street could have replaced defendant in this scheme. As the plea agreement states, Wymer needed an insider at Refco to help conceal the fraud. The suggestion that Wymer could have gotten someone else to help him presupposes that there were others at Refco who were as criminally inclined as the defendant. Although the government has stated that it has suspicions that others at Refco may have known about or participated. in the scheme, there is no evidence to support such a finding. As far as the Court is aware, no one else at Refco has been charged criminally with any wrongdoing. Indeed, defendant herself has consistently stated that she cannot provide any assistance to the government in its investigation because she has no knowledge of any wrongdoing by others at

---

[6] In fact, the Court questions whether anyone could ever receive over$300,000 in illegal profits from a fraud scheme and still be classified as a minor or minimal participant.

APPENDIX P

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

THE COURT: All right.

MR. MISTRETT: Judge, in any event, the Government in its response, I believe, sums this matter up quite succinctly when it indicates at page four thereof that the defendant's conduct, signing audit confirmat ions, given the plethora of concerted activity by others in the Wymer network constitutes that only of a minimal act. The Government has pointed to it's organizational chart set forth in this (?) bound sentencing submission, and I respectfully submit to the court, we also have submitted a chart in our papers that we both believe in light of the fact that they detail the relative culpability of the people involved, the overall activity that went on here --

THE COURT: Why are we dealing with overall activity

MR. MISTRETT: Judge, that I believe, is the initial focus that we should have here.

THE COURT: Really? Are you familiar with the Second Circuit Law that says that -- that when the base offense level was calculated on the limited role of the person that you don't take in the entire conspiracy? We're only talking about one aspect of this gigantic scheme. We're not talking about the overall Wymer conspiracy here for sentencing purposes of your client.

MR. MISTRETT: Judge, I feel in the unique circumstances that we have --

THE COURT: Which is?

MR. MISTRETT: Pardon me?

THE COURT: Which is?

MR. MISTRETT: Which is we have a scheme where one man has been the moving force, the head of this entire conspiracy --

THE COURT: We're not talking about the entire conspiracy. 1 mean, the law is contrary to what you're saying. I mean, Second Circuit has been quite clear, and I'm going to quote

the Second Circuit to you, so I make sure you understand where I'm coming from. In other words, the base defense level was calculated on the basis of a limited role and not the role of the entire conspiracy, a minor role reduction, pursuant to 3Bl.1 therefore is inappropriate --

MR. MISTRETT: Well, Judge, I would point out in response thereto --

THE COURT: Mr. Mistrett, I'm sure you're familiar with the case of United States verses Lewis. It's a 1996 Second Circuit discussion. So, your oral argument on overall conspiracy is not very persuasive.

MR. MISTRETT: Judge, let me just say this, if I can, in response to the court's position --

THE COURT: Well, I'm just reading the law on the Second Circuit.

MR. MISTRETT: I'm aware of that, Judge.

THE COURT: okay. Which I am bound to follow.

MR. MISTRETT: I'm also aware of that, Judge. With respect to the city of Loma Linda, Judge, in the memorandum dated April 18th, 1997, it's Ms. Rahill-Beuler's report at page three thereof, the probation office describes the City of Loma Linda scheme.

THE COURT: Page three of her report?

MR. MISTRETT: Yes, Judge. It's the third page if you count the cover page as page number one.

THE COURT: Okay. Page three. What paragraph?

MR. MISTRETT: It's entitled, "The city of Loma Linda Scheme" at the top ,

THE COURT: Okay.

MR. MISTRETT' Now, Judge, the first person treated therein is Steven Wymer, who I don't think anybody disputes here. is the king pin and most culpable individual involved in the instant offense, and I focus on the point that this is probation's view of the Loma Linda scheme, because on the previous page --

THE COURT: How much money are you saying was involved in the Loma Linda scheme; one hundred million dollars?

MR. MISTRETT: I'm not --

THE COURT: What are you saying it is?

MR, MISTRETT: Well, according to Ms. Rahill-Beuler's report, and I think this is confirmed in the papers, the total loss to Loma Linda was one million eight hundred thousand, and the probation department concluded --

THE COURT: One million eight hundred thousand -- or is it seven hundred and seventy-three thousand?

MR. MISTRETT: No, Judge, the entire -- I'm sorry, maybe I wasn't clear, On the previous page --

THE COURT: Well, let me ask you; what was the amount of money that you understand to be involved in the Linda Loma scheme?

MR. MISTRETT: The Loma Linda scheme.

THE COURT: Loma Linda, whatever.

MR. MISTRETT: There are two amounts, Judge. That's what I'm trying to point out to you.

THE COURT: Okay.

MR. MISTRETT: The amount, the total amount lost according to the April 18th memorandum is 1.8 million dollars. That's on page two of that memorandum under the title, "Overall Scheme". The loss attributable to the defendant as an employee of Refco is the figure which Your Honor mentioned, $773,789.

THE COURT: So, the relevant conduct is $773,000.

MR. MISTRETT: Yes, Judge.

THE COURT: That's just been calculated here?

MR. MISTRETT: Yes, Judge. I think that's --

THE COURT: So, why do you keep talking about the overall scheme?

MR. MISTRETT: Well, Judge, I thought it was a very relevant thing to discuss.

THE COURT: I just read to you what the second circuit said.

MR. MISTRETT: I understand that, Judge.

THE COURT: Well, how do you get around that?

MR. MISTRETT: I'm trying to show you, at least, if you're going to focus on Loma Linda, Judge, which it's my understanding that's what you're doing, I would like to respond to

your focus by continuing here at page three here if I might?

THE COURT: Okay.

MR. MISTRETT: As I started to say, Judge, under the specific heading of the "city of Loma Linda Scheme", Steven Wymer in this report is described as the king pin and most culpable individual involved in the instant offense. James Pierce -- Mr. Pierce's role is pointed out in this memorandum-- is well described on page two of Exhibit 1. His role extended to the City of Loma Linda. He had the role of making the various cities understand and believe Wymer's quote "magic" .

Now, in this report, the postal inspector who apparently was the main, if not one of the main investigators, and his estimate is contained in this memorandum. Mr. Pierce was quote, "considerably more culpable than the defendant" .

THE COURT: What scheme are you talking about?

MR. MISTRETT: This is right from the City of Loma Linda scheme.

THE COURT: That says various cities.

MR. MISTRETT: I'm sorry?

THE COURT: It says cities.

MR. MISTRETT: That's what we're talking about, Judge.

THE COURT: Well, that's only one city.

MR. MISTRETT: That's correct.

THE COURT: This says cities. To make the various cities.

MR. MISTRETT: I understand that, Judge, but --

THE COURT: So, we're talking about something even greater than just Loma Linda alone.

MR. MISTRETT: I don't know, Judge. I'm looking at a report that's entitled, "The City of Loma Linda Scheme". What I quoted to you is taken right from that heading, Judge.

THE COURT: But it says cities. While we got the probation officer right here, are we talking about just that one city?

PROBATION OFFICER: Your Honor, what Mr. Pierce did, he did in many cities including Loma Linda. He was able to make it work in various cities including Loma Linda. I suppose you can take out various cities and just say it's -- if you want to

take the Loma Linda, it would have the same purpose.

MR. MISTRETT : Again, Judge, I'm just pointing out that according to this memorandum, Mr. Pierce was considerably more culpable than the defendant with respect to Angela Chilles. I might add also, Judge, that James Pierce was employed by Mr. Wymer at the California office, a direct employee of Wymer. Angela Chilles was another direct employee of Wymer.

Again, according to this report under the heading of the "City of Loma Linda Scheme" , I again quote, Judge, "while Wymer is described as the master mind of the offense, Chilles made the scheme work. Her skills made it make sense on paper. She also had direct contact with the cities including the City of Loma Linda" .

The postal inspector, I'm jumping down quite a bit, Your Honor, but it is in that same paragraph, number three. "The postal inspector stated that she was clearly far more culpable even for just Loma Linda than the defendant".

Paragraph number four describes Diana King. She is described as Mr. Wymer's forger. Again, I quote, "by virtue of her willingness to forge anything and everything that Wymer asked her to forge, she has a higher level of culpability thanGoodman "

THE COURT: Maybe if she were convicted, maybe she could get a three level upward for her role in the offense.

MR. MISTRETT: Speculation, judge. I don't know that.

THE COURT: Okay.

MR. MISTRETT: Thomas Burn is the fifth person mentioned under the Loma Linda scheme. He was an independent auditor that Mr. Wymer himself recommended that the client should use, and they don't really assess -- or I should say his role is really not assessed in terms of his relative culpability to Ms. Goodman as far as the Loma Linda scheme.

Judge, I would have to say that obviously the guidelines in the application notes use examples of drug crimes, off-loader boats, things of that nature. Obviously, none of us read that to mean that a minor or minimal roll is limited to situations where people are in drug -- or excuse me, engaged in drug transactions. I think the problem that we have here, and it's a problem for me,

Judge, this is not an easy area. This isn't cut and dry. This isn't an easy area to deal with, but it's very difficult to graft a massive fraud case such as exists here.

THE COURT: What drug case are you talking about?

MR. MISTRETT: Massive fraud.

THE COURT: What fraud are you talking about?

MR. MISTRETT: The overall --

THE COURT: I'm not talking about the overall. I'm talking about the only issue that's relevant here. Not Wymer's overall one hundred million dollars. We're not talking about that for the purpose of the sentencing. You keep wanting to compare the overall conspiracy with your client's role. That's not what we're comparing it to, because that's not a proper analysis. At least, I don't believe it is.

MR. MISTRETT: Well, Judge, we'll obviously have tobe pursuing that. But all I'm saying --

THE COURT: Well, the law is clear on it, I mean, the Second Circuit has stated in the Lewis case and in the Gomez case in 1993 -- "

MR. MISTRETT: Judge, this is an unusual circumstance. It's virtually impossible to fit application notes dealing with drug crimes into the facts of this case, but I'm saying to you, Judge, even under the limited view of the Loma Linda scheme as contained now in the memorandum dated April 18th, in that very memorandum, certain people are described as far more culpable than Kim Goodman.

THE COURT: But you're saying -- you're equating more culpable, therefore, she must have a smaller role.

MR. MISTRETT: By virtue of what she did, Judge --

THE COURT: First of all, you start with the offense level we're talking about in this situation. Her involvement is $773,000. Okay. That's the amount we're talking about.

MR. MISTRETT: That's correct.

THE COURT: That's where the offense level was calculated at.

MR. MISTRETT: That's correct.

THE COURT: okay. So, now the $773,000 when she -- well, what's the amount of money that she received from Wymer and her involvement in the $773,000? She's got a Jaguar for $62,000. Mercedes Benz for $66,000. $178,000 in cash. I add that up to almost forty percent of all the income went to her. hat could hardly put her in a minimal, probably not even a minor role.

MR. MISTRETT: Judge --

THE COURT: probably puts her right at the -- maybe even at the offense level without any calculation or increase in the amount .

MR. MISTRETT: Judge, as we explained in our papers --

THE COURT: Well, you explained in your papers that, Judge, we worked this thing all out with the Government, and I don't understand why you're making a big issue out of this. We've already agreed to this, the Government and the defense.

MR. MISTRETT: That' s not --

THE COURT: That's the impression I got from reading these papers.

MR. MISTRETT: Pardon me?

THE COURT: That'S the impression 1 get from reading these papers. What are you looking into this for, Judge? We've already figured this all out for you.

MR. MISTRETT: Judge, if that was my position, I don't think I would have set forth twenty pages of affidavit and fifteen pages of memorandum of law.

THE COURT: Well, would you agree with me that her nvolvement, at least, as far as dollars and cents is about forty percent?

MR, MISTRETT: Well, no, Judge, I can't agree to that because as I set forth in our affidavit, yes, she did receive a Jaguar, Judge. There's no question.

THE COURT: And a Mercedes and $178,000 in cash.

MR. MISTRETT: Well, but, Judge, the affidavit points out that the Jaguar she thought was gift from Wymer for money she had made for him trading in valid commissions thereof -- commissions, excuse me. And then that car was destroyed in an accident, and he gave her the Mercedes. As, your Honor can see,

we put the price of the Mercedes, and then we put the shipping cost and the fact that she paid the tax to the Department of Motor Vehicles. She went -- with respect to the Jaguar, she went to an attorney to see if what -- to accept a gift under those circumstances was proper, because she was working in an SEC controlled business, and she went and got a lawyer's advice, Judge. Now, what Wymer had in his mind, Judge, as to why he was giving those cars to the defendant --

THE COURT: What lawyer was that?

MR. MISTRETT: I'm sorry?

THE COURT: What lawyer is that? Is that the SEC lawyer?

MR. MISTRETT: No. No.

THE COURT: The question is the amount of money she got from Wymer for her assistance was $773,000, or was this -- well, maybe now it's the money I just indicated.

MR. MISTRETT: Well, Judge, she received those things, but I would like to respond. I've just responded to the cars. I'm trying to find in my, affidavit -- the lawyer's name is Sergeant, Judge. I just can't find you a paragraph referenced in my affidavit, but in any event, she did go and seek advice from this attorney to make sure that -- I'm sorry, here it is, the affidavit paragraph 43.

THE COURT: Let me ask you; do you concede to the fact that she received a $62,00 Jaguar, $66,00 Mercedes, and $178,000 for a grand total of $306,000 for her involvement with Wymer?

MR. MISTRETT: Well, no. No, I don't concede that, Judge.

THE COURT: Well, what do you concede?

MR. MISTRETT: I concede that she received a Jaguar, 22 which she thought was for the good trades, a gift from a valued client that she helped make a lot of money for. I concede that when that car was cracked up --

THE COURT: What was she doing at that time?